88-1630

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NORTH AMERICAN PHILIPS CORPORATION,
U.S. PHILIPS CORPORATION and
N.V. PHILIPS' GLOEILAMPENFABRIEKEN,

Petitioners,

v.

WINDMERE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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April 5, 1989

Question Presented

Does a competitor with a large market share—who intends to take business away from and thereby injure a competitor—monopolize in violation of § 2 of the Sherman Act by selling new products at low but profitable prices that are above its average variable cost?

Rule 28.1 Statement

The parents, subsidiaries, and affiliates of petitioners North American Philips Corporation and U.S. Philips Corporation, other than wholly owned subsidiaries, are listed below:

N.V. Gemeenschappelijk Bezit van Aandeelen Philips' Gloeilampenfabrieken
N.V. Philips' Gloeilampenfabrieken
FGP Corp.
Laser Magnetic Storage Company
OptImage Interactive Services
Philips and Dupont Optical Company
AirVision
Japan Magnavox Navigation Equipment Company, Ltd.
Sanken-Airpax Co., Ltd.

The parents, subsidiaries, and affiliates of petitioner N.V. Philips' Gloeilampenfabrieken, other than wholly owned subsidiaries, are listed below:

Foreign

N.V. Gemeenschappelijk Bezit van Aandeelen Philips' Gloeilampenfabrieken Sisteval S.A.
Associated Radio Finance (Australia) Limited
Electric Lamp Manufacturers (Australia) Pty Ltd.
Lamp Partnership Agreement
Medical Applications Pty Limited
Neutrodyne Pty Ltd.
The Travel Software Company Pty Limited
Bangladesh Electrical Industries Limited
Bangladesh Lamps Limited
ACEC Lighting

Cable and Wire Assemblies
Europese Mij voor Fabricage en Verkoop van Gloeilampenonderdelen "E.M.G.O."
Philips Coordination Center
Philips Matsushita Battery Corporation
SYMEA S.A.
Telecity DC-I
Unicar Travels S.A.
Vermont S.A.
Bankgeschaft Heinrich Behncke GmbH
BTS-Broadcast Television Systems GmbH
Polygram GmbH
Polygram S.A.
Polygram Leisure Ltd.
Clouth Gummiwerke AG
Euroventures Deutschland GmbH & Co. KG
Grundig Aktiengesellschaft
Grundig Elektrogerate Gessellschaft mbH
Grundig Verwaltungs-GmbH
Norddeutsche Seekabelwerke AG
Philips Kommunikations Industrie Aktiengesellschaft
Philips Mietsystem GmbH
Tellus Grundstuchsverwaltungs GmbH
Fonobras-Distribuidora Fonografica Brasileira Ltda.
Peterco do Nordeste Produtos Eletricos S.A.
Modu-Tronics Inc.
Beijing Philips Audio/Video Corporation
Car Audio Electronics (China) Company Limited
Hua Fei Colour Display Systems Company, Ltd.
Shenzhen Shen Fei Laser Optical Systems Company Ltd.
The Sino-Dutch International Engineering Company Ltd.
Yangtze Optical Fibre and Cable Company, Ltd.

Industria Andina de Iluminacion
Industrias Centrales del Acero S.A.—
"Induacero S.A."
El Nasr Company for Electrical and Electronic
Apparatus (NEEASAA)
Philippine Glass Bulbs, Inc.
COGEDEP, Compagnie Generale Europeenne de
Distribution et d'Edition Phonographique S.A.
Compagnie Philips Eclairage
La Radiotechnique
Laura Hallyday Productions S.A.
S.A. d'Etudes et Realisations Nucleaires-
S.O.D.E.R.N.
Self Music S.A.
Service S.A.
Societe pour la standardisation et l'integration
de l'image a l'informatique (S.S.I.I.I.)
Sois Villes Lumieres
Telecommunications Radioelectriques et
Telephoniques "TRT" S.A.
Polygram Records Ltd.
Records Manufacturers (Ghana) Ltd.
Car Audio Electronics (Hong Kong) Limited
Cinepoly Records Co. Ltd.
Electronic Devices Limited
P & M Properties Ltd.
Zhen Shi Investments Ltd.
Silicon & Software Systems Limited
Stromsay Ltd.
Hind Lamps Ltd.
Music India Ltd.
Peico Electronics & Electricals Limited
Punjab Anand Lamp Industries Ltd.
P.T. Philips Development Corporation

P.T. Philips-Ralin Electronics
Daco Ltd. (Private Joint Stock Company)
Iranian Lamps Ltd. (Private Joint Stock Company)
Radioelectric Iran Ltd. (Public Joint Stock Company)
Chapulin Edizioni Musicali S.r.l.
Denshi Media Services Company Limited
Japan Interactive Media Inc.
Japan New Media Systems, Inc.
K.K. Keystone
Marantz Japan, Inc.
Matsushita Electronics Corporation
Nihon Micro Motor Co. Ltd.
Nihon Philips Corporation
Nihon Tecnico K.K.
Nippon Phonogram Co. Ltd.
Philips Sensor Technology Corp.
PNN Corporation
Polydor K.K.
Red Bus Enterprise Inc.
Sanken-Airpax Co. Ltd.
Takahashi Kogei Co. Ltd.
Your Records K.K.
Light Incorporated and Trading S.A.L.
Binafon Telecommunications Sdn. Berhad
Electronic Systems (Malaysia) Sdn. Bhd.
Malaysian Lamps Sendirian Berhad
Maltronics Sendirian Berhad
Manufacture Nationale pour la Refrigeration et l'Electronique "MANAR"
Maroc Lumiere Industrie S.A.
Omnium de Participations et de Gestion Maghrebin "O.P.G.M."
Societe Anonyme Marocaine de Telecommunications "SAMTEL"

Societe Marocaine de Commerce et Industrie Electronique "SOMACIEL"
Societe Marocaine "MARIX"
Compania de Vidrio Industrial, S.A. de C.V.
Compania Mexicana de Componentes, S.A. de C.V.
Telecommunicaciones y Systemas Profesionales, S.A. de C.V.
Art Data Institute B.V.
ASM Lithography B.V.
AT&T Network Systems International B.V.
Bank Mendes Gans N.V.
Business Logistics Systems (B.L.S.)
B.V. Grammoservice, Distributiemaatschappij voor Grammofoonplaten
Circle Information Systems B.V.
Holco Computerservices & Software B.V.
Hollandse Signaalapparaten B.V.
Micro Scope B.V.
Optical Disc Mastering (ODM)
Philips and Du Pont Optical Company
Phonosongs (V.O.F.)
Polygram N.V.
Polysongs (V.O.F.)
Record Service Benelux (V.O.F.)
Splendor Gloeilampenfabrieken B.V.
Twilo B.V.
Whirlpool International B.V.
Wisselsongs (V.O.F.)
Amalgamated Finance Ltd.
Cablevision New Zealand Ltd.
Flourescent Lamp Partnership
New Zealand Electric Lamp Manufacturers Ltd.
Tisco Holdings (New Zealand Ltd.)
Associated Electronic Products (Nigeria) Limited
Polygram Records Ltd.

AKG Holding AG
"Philips" Mietfinanzierungs-GmbH
SELTRON International Export-Import Gesellschaft mbH
Telekabel—Fernsehnetz Graz Betriebsgesellschaft mbH
Telekabel—Fernsehnetz Klagenfurt Betriebsgesellschaft mbH
Telekabel—Fernsehnetz Region Baden Betriebsgesellschaft mbH
Telekabel—Fernsehnetz Wiener Neustadt/ Neunkirchen Betriebsgesellschaft mbH
Telekabel Wien Gesellschaft mbH
Philips Electrical Industries of Pakistan Limited
Afalesa
Electro Valvula S.A.
Industria Electronica de Comunicaciones S.A.
Infoservicios, S.A.
Union Electrodomesticos S.A.
Compact Disc Industries Co., Ltd.
Iwakura Press Industry Ltd.
Taiwan Lighting Industries Co., Ltd.
Taiwan Semiconductor Manufacturing Company Limited
Electrical Lamp Manufacturers Thailand Limited
Windmill Company Ltd.
Avex A.S.
Societe Tunisienne d'Eclairage
Societe Tunisienne d'Industrie Electronique et de Television "S.T.I.E.T."
Birlesik Aydinlatma Sanayi ve Ticaret A.S.
Turk Philips Aydinlatma Sanayi ve Ticaret Anonim Sirketi
Turk Philips Sanayi Anonim Sirketi "Philisan"

Turk Philips Ticaret Anonim Sirketi
Adrawing Ltd.
Alto Music Ltd.
Bank Three Holdings Ltd.
Cedarwood Music Ltd.
Channel 5 Video Distribution Ltd.
Debonaire Music Ltd.
European Cables Ltd.
F.F.R.R. Music Ltd.
F.F.R.R. Records Ltd.
Go! Discs Ltd.
Gralto Music Ltd.
Kempston (1987) Ltd.
Pageant Music Ltd.
Paragon Publicity & Public Relations Ltd.
Philips Lighting Manufacturing Ltd.
Spencer Davis Music Ltd.
Tiger Music Ltd.
Validfirst Ltd.
Aberdare Cables Africa Limited
A.I.B. Investments (Pty) Ltd.
Associated Glass Works (Pty) Ltd.
Consolidated Cable Investments (Pty) Ltd.
Electric Lamp Manufacturers of South Africa (partnership)
Electric Lamp Manufacturers of South Africa (Pty) Ltd.
PEC Investments (Proprietary) Limited
Philips Electronics Holdings Limited
PISA Investments (Pty) Ltd.
Swiss Office Machinery Company (Pty) Ltd.
Hanwha Domestic Appliances Co. Ltd.
A.P. Radio, Goteborg
Grammo Rack Service AB
Dick James Music AG

Discorack AG
Faselec AG
Flammesco AG
Gluhlampenfabrik Gloria AG
Studer and Philips CD Systems AG
Validfirst Ltd.

Domestic

American Interactive Media Inc.
Ice Ltd.
Laser Magnetic Storage International Company
OptImage Interactive Services Company
Philips and Du Pont Optical Company
Polygram Music Publishing Inc.
Polygram Songs Inc.
Polygram Tunes Inc.
The Educational Video Group Inc.
Airvision

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners North American Philips Corporation ("NAPC"), U.S. Philips Corporation ("USPC") and N.V. Philips' Gloeilampenfabrieken ("N.V. Philips") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered November 14, 1988.

Opinions Below

The opinion of the Court of Appeals for the Federal Circuit is reported at 861 F.2d 695 and is reprinted in Appendix A, *infra*.[1] The opinion of the District Court is reported at 680 F. Supp. 361 (S.D. Fla. 1987), and is reprinted in Appendix B, *infra*.

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[1] Citations preceded by a letter designation are to the appendices to this petition.

Jurisdiction

The judgment of the Court of Appeals was dated and entered November 14, 1988 (C 1). Rehearing was denied on January 13, 1989 (D 1), and the suggestion for rehearing en banc was declined on January 27, 1989 (E 1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statute Involved

Section 2 of the Sherman Act, as amended, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. (F 1)

Statement of the Case

Price cutting may constitute the vigorous competition the antitrust laws encourage or reflect the unlawful use of predatory pricing to perpetuate a monopoly. Although the Court has recently recognized that "[t]here is a good deal of debate" over what constitutes predatory pricing, *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 584 n.8 (1986), it has refrained from precisely defining the term. *See Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 118 n.12 (1986). As a result, and due to varied and conflicting decisions of virtually all the

Courts of Appeals, businesses throughout the nation, and counsel who advise them, have no understanding of whether the prices they charge are lawful or will result in lengthy and expensive litigation and treble damage liability. Indeed, as shown in detail at pages 10-12, *infra,* the same price may be conclusively lawful in some circuits, presumptively lawful in others, and evidence of unlawful monopolization in yet other circuits. The opinion below has not only added to this substantial confusion, but has also chilled vigorous price competition and discouraged the setting of lower prices in an economic era in which higher prices and inflation have become increasingly prevalent evils.

In deciding when lower prices may violate § 2 of the Sherman Act, the opinion below stands the Act on its head. The decision prevents a competitor with a large market share from engaging in price competition with a smaller rival while protecting a new entrant from price competition by providing a price umbrella. In effect, the opinion protects an individual competitor at the expense of competition. According to the court below, the Sherman Act prevents petitioner NAPC from competing by selling new products at prices that were above its average variable cost because NAPC's pricing—however profitable to it—eliminated a competitor.

The facts presenting what we respectfully submit is a question of profound significance to the economy and the maintenance of effective competition are straightforward. In October of 1984, NAPC and its sister corporation USPC sued Windmere Corporation ("Windmere") and its supplier Izumi Seimitsu Kogyo Kabushiki Kaisha for infringement of USPC's electric shaver patent and for unfair competition under the Lanham Act. Windmere responded by filing a seven count counterclaim, charging NAPC, USPC

and their parent company N.V. Philips with violations of sections 1 and 2 of the Sherman Act, the Robinson-Patman Act, the Clayton Act, the Antidumping Act of 1916, and various state laws.

Despite the breadth of Windmere's allegations, the only issue before the court below was whether the district court properly directed a verdict on Windmere's § 2 claim after a three week jury trial.[2] In support of its claim under § 2, Windmere attempted to show that NAPC monopolized the rotary electric shaver market when, to compete with Windmere's new low priced products, NAPC introduced two new models of electric shavers purportedly at prices below NAPC's average variable cost.[3]

Windmere presented two witnesses, both its own employees, to support its claim that NAPC "sold its 1320 and 1615 models below its average variable costs. . . ." (A 9). One witness testified that he had no understanding of what the term "variable cost" meant and that his testimony re-

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[2] Only Windmere's claim under the Sherman Act survived the presentation of all evidence. Other claims were dismissed either on summary judgment or directed verdict after the presentation of Windmere's case. Windmere did not appeal these rulings, and it "abandoned" its claim under § 1 (A 2; *see also* A 23). Therefore, the Court of Appeals reviewed only the directed verdict dismissing the § 2 claim.

[3] Electric shavers typically fall into two categories. NAPC's primary product is a rotary electric shaver that NAPC purchases from N.V. Philips and sells under the Norelco brand. Rotary shavers generally have one or more rotating blades under a circular comb. Both NAPC and Windmere, which sells under the Ronson brand, also sell foil electric shavers that generally have blades that move either in an oscillating or reciprocating manner under a perforated foil. The trial court held that Windmere had presented sufficient evidence to create a jury question on its claim that the relevant market consisted solely of rotary shavers (B 7), and petitioners did not contest that ruling. Thus, there was no dispute as to relevant market in the court below.

garding NAPC's costs was an "educated opinion." Windmere's other witness actually testified that NAPC made "a profit" on the two models at issue, using the cost accounting methodology proposed *by Windmere's counsel* and using NAPC's actual costs. Windmere presented no expert testimony on the issue.

Windmere also attempted to show that NAPC's prices were unlawfully low because NAPC allegedly "failed to maximize profits." While Windmere never articulated the parameters of this claim, the testimony of its witnesses suggested that NAPC's prices on the low-end models of its product line were unlawful because, according to Windmere, each sale of a lower priced NAPC shaver took a sale away from a much higher priced NAPC shaver. Under Windmere's theory, it would always be unlawful for a business to offer a varied product line with a range of prices. This alternative theory was not considered by the Court of Appeals and is not a basis for its decision.

At the conclusion of this "evidence," petitioners moved for a directed verdict.

The District Court's Decision

Although finding that a jury could conclude from the evidence that NAPC and N.V. Philips "had market power in Windmere's proposed relevant market" (B 7), the district court concluded that there was no evidence from which a jury could conclude that petitioners unlawfully maintained or acquired a monopoly. Citing *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966), the court held that "the Sherman Act prohibits only those monopolies that are willfully acquired or maintained as distinguished from those that result from a superior product, business acumen or historic accident" (B 6).

The court examined the relevant case law, noted that low prices are the hallmark of the competition the antitrust laws were designed to protect and promote (B 9-10), and held that low prices may be evidence of monopolization only if those prices are below defendant's marginal cost:

> [M]arginal cost was chosen, even though prices at or above it are not necessarily profit-maximizing, because at the point where price equals marginal cost, only less efficient firms will suffer larger losses per unit of output than the alleged monopolist; more efficient firms will be losing less or operating profitably.

(B 11).[4] The district court reasoned that notwithstanding defendants' supposed intent to vanquish a rival, low prices that are profitable to defendants and beneficial to consumers do not constitute evidence of a practice forbidden by the antitrust laws (B 9-11).

In reviewing Windmere's evidence, the district court ruled that no reasonable juror could find that NAPC's prices were below its average variable cost. Although this holding rested on a number of alternative grounds, the district court principally held that the prices at issue were profitable to NAPC if NAPC's actual advertising expenditures were used in the calculation, regardless of whether the other "projected" costs and peculiar methodology advanced by Windmere were also used (B 14-16). Thus, the district court held that regardless of how Windmere manipulated other figures or whether costs were categorized as fixed or variable, NAPC made a profit on the models at issue

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[4] Average variable cost is normally used as a surrogate for marginal cost, *i.e.*, the cost of making the last unit of output, because average variable cost is easier to determine. Areeda & Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 716 (1975).

when NAPC's actual advertising expenditures—an amount on which all parties agreed at trial—were used in the calculation (B 12-16).[5]

The district court also rejected Windmere's contention that in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), the Court held that a competitor with a large market share may not sell at low prices if it intends thereby to harm a rival (B 16-17).

After granting the directed verdict, the district court entered judgment under Fed. R. Civ. P. 54(b) and, pursuant to 28 U.S.C. § 1295(a)(1), Windmere appealed to the Court of Appeals for the Federal Circuit.

The Court of Appeals' Decision

The Court of Appeals, in a three-to-two decision, reversed and held that a competitor with a large market share violates the Sherman Act if it lowers prices with the intent to harm a competitor:

> Evidence that a firm holding 90 percent of a market that has substantial entry barriers drastically

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[5] Windmere's witnesses and its counsel admitted that there was no dispute about this sole crucial figure. Windmere's Vice President of Finance testified that NAPC's "total advertising expense for 1985 was $17,558,000" and its counsel agreed:

> The Court: So the record evidence we have got shows they actually spent seventeen million and change?
> [Windmere's Counsel]: Right.

Windmere's counsel and witnesses also agreed that $6.6 million in cooperative advertising support received by NAPC had to be deducted from this figure. Although on appeal Windmere attempted to backtrack from (i) its witnesses' admissions, (ii) the demonstrative evidence it introduced, and (iii) its counsel's statement in argument before the district court that "[w]hat the evidence shows is that the 6.6 million was given to North American Philips," there was, in the words of the dissent below, "no *evidence* to the contrary." (A 26).

> slashes its prices in response to the competition of a new entrant, for the purpose and with the effect of eliminating that entrant, is sufficient to show monopolization, in violation of section 2 of the Sherman Act. (A 18)[6]

The Court of Appeals held that liability for predatory pricing under § 2 in no way turns on defendant's costs of production or whether its lower prices reflect greater efficiencies than those of its competitor. Rather, according to the court below, liability under the Sherman Act for setting lower prices depends only on the size of defendant's market share, its intent, and the effect of its lower prices on a single competitor.

Reasons for Granting the Petition

The decision below—holding that a competitor with a large market share violates § 2 if its low prices are intended to and do harm a rival—presents a substantial federal question regarding the interpretation of the Sherman Act, reflects and adds to the confusion among the Courts of

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[6] The Court of Appeals also found that other issues—such as the allocation of advertising expenses as fixed or variable and whether projections may be used to prove actual costs—should have been submitted to the jury (A 19). The Court of Appeals did not disturb the district court's holding with regard to NAPC's actual advertising expenditures, although it ruled that the "proper treatment" of this figure in determining variable costs "was an issue for the jury to decide" (A 20). Therefore, although the Court of Appeals determined that the jury should decide whether NAPC's advertising costs were fixed or variable, it did not disturb the trial court's ruling that NAPC made a profit regardless of that allocation if actual advertising expenditures were used. Because that finding was not disturbed, the Court of Appeals was simply wrong that "the evidence was sufficiently in conflict to require submission of the issue to the jury" under the average variable cost test applied by the District Courts (*see* A 18). At trial, there was *no* conflict over this figure. *See* n.5, *supra*.

Appeals as to what constitutes predatory pricing, and is contrary to fundamental principles of antitrust law established by this Court.

I.

The Sherman Act "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958). Although "cutting price in order to increase business often is the very essence of competition," *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986), price cutting can, in limited circumstances, be predatory and harm consumers, thereby defeating the goals of the Sherman Act. The Courts of Appeals have expressed divergent views on what distinguishes lawful price competition from unlawful predatory pricing, and this Court has yet to resolve the issue or decide whether, as the district court concluded, lowering prices to profitable levels is not proscribed by the Sherman Act. *See id.* at 584 n.8.

Wholly apart from the pernicious effects on competition caused by the holding below, this state of uncertainty regarding the legality of pricing is itself harmful to vigorous competition. Businesses are unlikely to charge prices that are equal to or just above marginal cost—even though sales at that level would be profitable and benefit consumers—if the legality of such pricing remains unclear. Indeed, the Court has previously recognized that erroneous interpretations of the Sherman Act or uncertainty regarding its scope can chill the very competitive conduct the Act seeks to advance. *Id.* at 594.

The Court of Appeals decision in this case has precisely this effect. Under the holding below, the lawfulness of a price turns on a competitor's intent and, perhaps worse, the effect of its price cutting on a single competitor. Is a competitor with a large market share precluded from introducing new products at lower prices because its salespersons have recorded in colorful language an intent to harm their rival? Must that competitor ensure that its prices will not cause the demise of a less efficient firm? The opinion below answers these questions in the affirmative, rendering pricing decisions virtually impossible and chilling the very essence of competition. As one commentator recognized years ago:

> It is imperative that courts timely establish objective and understandable pricing standards while bringing into sharp focus the line which separates commendable price reductions from predatory pricing practices. Such standards are necessary for the guidance of businessmen. . . . Businessmen should not be put into the position where they must either forego competitive price decreases or risk treble damages in Sherman Act suits.

Sherer, *Predatory Pricing: An Evaluation of Its Potential for Abuse Under Government Procurement Contracts*, 6 J. Corp. L. 531, 539 (1981).

II.

The question of what distinguishes pro-competitive price competition from predatory pricing has been answered by ten Courts of Appeals in nine significantly different ways. The confusion identified by the Court in 1986 in *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 118 n.12 (1986) ("[d]efinitions of predatory pricing also vary among the Circuits"), has only become worse.

Thus, in the First Circuit, a predatory price is one (a) below some undefined measure of cost that (b) has been set with the intent of driving out competitors. *Monahan's Marine, Inc.* v. *Boston Whaler, Inc.*, 1989-1 Tr. Cases (CCH) ¶ 68,422 (1st Cir. 1989); *Clamp-All Corp.* v. *Cast Iron Soil Pipe Institute*, 851 F.2d 478, 483 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 789 (1989). The Seventh Circuit has adopted the first but not the second part of the First Circuit test. *MCI Communications Corp.* v. *AT&T*, 708 F.2d 1081, 1111-31 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

A price above average variable cost is presumed non-predatory in the Second and Eighth Circuits, *Northeastern Tel Co.* v. *AT&T*, 651 F.2d 76, 87-88 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Henry* v. *Chloride, Inc.*, 809 F.2d 1334, 1344-46 (8th Cir. 1987), and is deemed lawful in the Fifth Circuit if barriers to entry are not substantial. *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

In the Sixth Circuit, pricing above average *total* cost is deemed lawful, *Arthur S. Langenderfer, Inc.* v. *S.E. Johnson Co.*, 729 F.2d 1050, 1056 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984), and the Ninth Circuit agrees unless predatory intent is proven by clear and convincing evidence. *See Transamerica Computer Co.* v. *IBM*, 698 F.2d 1377, 1384-88 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983). The Eleventh Circuit also agrees that prices above average total cost are not predatory but defines "average total cost" as including "the necessary minimum profit" which can only be ascertained, according to the court, through expert testimony, thereby subjecting every predatory pricing claim—however spurious—to a jury trial.

McGahee v. *Northern Propane Gas Co.*, 858 F.2d 1487, 1503 n.35 (11th Cir. 1988) (petition for certiorari filed March 17, 1989).

Like the opinion below, the Tenth Circuit rejects any cost-based test for predatory pricing but considers average variable cost "a valuable indicator." *Instructional Systems Development Corp.* v. *Aetna Casualty and Surety Co.*, 817 F.2d 639, 648 (10th Cir. 1987). Both the Third and the District of Columbia Circuits have refused to adopt any specific test, although the Third Circuit is "inclined to accept the basic premise . . . that predatory intent may not be inferred from sales at or above average variable cost." *O. Hommel Co.* v. *Ferro Corp.*, 659 F.2d 340, 352 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Southern Pacific Communications Co.* v. *AT&T*, 740 F.2d 980, 1006 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985).[7]

Thus, under the current interpretation of the Sherman Act by the Courts of Appeals, pricing above average variable cost—such as that by NAPC here—is lawful in the Fifth Circuit, presumptively lawful in the Second and Eighth Circuits, possibly lawful or unlawful in the First and Seventh Circuits depending on the definition of cost, lawful if prices are also above total cost in the Sixth and Eleventh Circuits, and lawful or unlawful depending on defendant's intent in the Ninth and Tenth Circuits and according to the opinion below.

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[7] The confusion among the Circuits and the significance of the question presented herein is confirmed by the filing in recent years of no less than eight petitions for certiorari seeking the Court's determination of what constitutes predatory pricing. *See* pages 11-12, *supra*. Most recently, the Court has denied the petition raising this question in *LSLJ Partnership* v. *Frito-Lay, Inc.*, 57 U.S.L.W. 3550 (1989), while the petition in *McGahee*, *supra*, filed March 17, 1989, remains pending.

This state of legal confusion is made all the more intolerable because it not only affects a business decision that constitutes the very essence of competition, but also because thousands of businesses must make such decisions every day for products sold nationwide. Moreover, the conflict among the Circuits not only chills price cutting by subjecting businesses to both the risk of treble damages and the prospect of lengthy and expensive litigation, but it also encourages forum shopping by plaintiffs seeking the most favorable definition of predatory pricing.

It is therefore critical to the public interest in properly functioning markets and vigorous competition, and to the administration of the antitrust laws as a whole, that the Court consider and answer the question presented.

III.

The holding below—that a dominant firm violates § 2 by "slashing its prices in response to the competition of a new entrant, for the purpose and with the effect of eliminating that entrant" (A 18)—proscribes not only unlawful conduct, but also lawful price cutting, which the Court has found to be the very essence of competition regardless of the size of defendant's market share. Reinforcing the principle that the antitrust laws protect "competition[,] not competitors," *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)), the Court in *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), ruled:

> *Brunswick* holds that the antitrust laws do not require courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices for-

> bidden by the antitrust laws. The kind of competition that Monfort alleges here, competition for increased market share, is not activity forbidden by the antitrust laws. It is simply, as petitioners claim, vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. *The antitrust laws require no such perverse result, for "it is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition."* *Arthur S. Langenderfer, Inc.* v. *S.E. Johnson Co.*, 729 F.2d 1050, 1057 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984).

Id. at 116 (emphasis added).

It is precisely the vigorous price competition by a dominant firm the Court sought to protect in *Cargill* that has been proscribed by the court below.[8]

The court below has also misconstrued the Court's holdings in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) and *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946). In citing those decisions as support for its holding (A 18), the court below failed to distinguish between the business practice at issue here—price cutting which is always imbued with the legitimate justification of increasing sales—with the practices in

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[8] As the dissent below stated:

> Nor can I agree that it is probative of violation of the Sherman Act to introduce a lower-priced model in response to a competitor's low-price model. . . . Industrial competition is not benevolent, and causing loss of profits to a competitor, or making the market less attractive to a competitor, whereby a less efficient or higher cost competitor leaves the market, is not itself a violation of antitrust law.

(A 28-29).

Aspen (termination of joint business relations) and *American Tobacco* (price fixing, refusals to deal, sham bidding) which, the Court found, had no legitimate business justification.

Aspen and *American Tobacco* did not, contrary to the holding below, establish the principle that a dominant firm may not engage in price competition with a smaller rival if it intends to harm that rival.[9] The decision below proscribes lawful price competition by a dominant firm and conflicts with the Court's prior decisions.

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[9] An intent to harm a rival rather than an intent to increase sales cannot provide the demarcation between lawful and unlawful conduct. *See Adjusters Replace-A-Car, Inc.* v. *Agency Rent-A-Car, Inc.*, 735 F.2d 884, 887 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) ("[A] manifestation of intent to triumph in the competitive market . . . is not enough to establish an antitrust violation.") (quoting *Hayes* v. *Solomon*, 597 F.2d 958, 977 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980)); *see also Olympia Equipment Leasing Co.* v. *Western Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987).

Conclusion

For the reasons stated, a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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April 5, 1989

APPENDIX A

Opinion of the Court of Appeals, November 14, 1988

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

87-1476

U.S. PHILIPS CORP. AND NORTH AMERICAN PHILIPS CORP.,

Plaintiffs-Appellees,

v.

WINDMERE CORPORATION,

Defendant-Appellant,

IZUMI SEIMITSU KOGYO KABUSHIKI KAISHA,

Defendant.

DECIDED: November 14, 1988

Before MARKEY, *Chief Judge*, FRIEDMAN, SMITH, NEWMAN, and MAYER, *Circuit Judges*.

FRIEDMAN, *Circuit Judge*.

This case involves electric shavers. Windmere Corporation (Windmere) appeals from a final order of the United States District Court for the Southern District of Florida directing a verdict in favor of U.S. Philips Corp. and North American Philips (collectively Philips) on Windmere's antitrust counterclaims. Because we hold that there was sufficient evidence to submit the antitrust claims to the jury, we reverse and remand for a new trial on those claims.

I

A. The Proceedings in the District Court.

In October 1984, Philips filed suit in the district court against Windmere and Izumi Seimitsu Kogyo Kabushiki

Kaisha (hereinafter Izumi) (a Japanese corporation) for infringement of Philips' electric shaver patent and against Windmere for unfair competition. Windmere filed a counterclaim alleging that Philips had monopolized and attempted to monopolize the electric rotary shaver market, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2 (1982), and that Philips and Dutch Philips (N.V. Philips Gloeilampenfabrieken) had conspired to restrain trade in that market, in violation of Section 1 of that Act, 15 U.S.C. § 1 (1982). Windmere apparently has abandoned its Section 1 claim.

Both the antitrust and the patent issues were tried to a jury. At the close of Windmere's antitrust case, the district court granted Philips' motion for a directed verdict on those issues. The court submitted the patent and unfair competition issues to the jury, which ruled for Philips on the patent claim and for Windmere on the unfair competition claim. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the court certified its order directing a verdict on the antitrust counterclaim as final and therefore appealable.

B. The Evidence Relating to the Antitrust Counterclaim.

1. *The product involved.* Philips sells, among other things, electric shavers under the NORELCO and the SCHICK brand names. There are two styles of electric shavers: rotary and foil. Rotary shavers use high-speed rotating cutters under a circular comb. Foil shavers use vibrating blades under an etched metal foil. Rotary shavers are either cordless rechargeable models or less expensive corded models.

Philips introduced its Norelco rotary shaver in 1948. The first model contained a single head. This was followed by a double- and then a triple-headed shaver; Philips intro-

duced the latter in 1966. The Norelco triple-headed rotary shaver accounts for at least 75 to 80 percent of Philips' total shaver sales. In 1981, Philips purchased the rights to the SCHICK trademark and used it to market its foil shaver.

2. *The rotary shaver market.*

a. *The relevant market.* Philips does not dispute that there was sufficient evidence upon which the jury could have concluded that for antitrust purposes electric rotary shavers constituted a separate market from electric foil shavers. There also was evidence that shavers priced above $30 constituted a separate market from those priced below that amount. Philips has tended to concentrate on the higher priced models, which generally are the cordless or rechargeable shavers. In 1983, the year before Windmere entered the electric shaver market with its Ronson shaver, Philips had 72.8 percent of the sales of above-$30 shavers.

b. *The concentration of that market.* Prior to the entry of Windmere and Sears Roebuck into the rotary shaver market, Philips' Norelco shaver was the only product there. Mr. Gould, Windmere's economist expert, who had worked for the Census Bureau and the Department of Justice, estimated that "in 1985 the Norelco share of the rotary market was of [sic] the order of ninety percent." Gould, who had studied the concentration ratios of more than 400 industries, testified that Norelco's share of the rotary market was "the highest figure I have encountered in all of my studies. . . . Going back thirty years."

c. *Barriers to entry.* There was evidence that a recognized brand name was critical to successful entry into the electric shaver market. In 1977, Windmere first attempted

to market a foil shaver and used the manufacturer's name (Payer). The name was not well-known, and the shaver line was discontinued. The president of Windmere testified that Windmere's customers advised them "that there was no way we could be in the electric shaver industry without a brand. Windmere doesn't qualify as a national brand that was known in the electric shaver business which is what they told us [sic] we needed." Although this testimony was admitted with a limiting instruction that it was allowed to show only "state of mind" and not the "truth of the answer," the fact that Windmere believed that it needed a brand name to succeed in the market is evidence that such a name was necessary. -

Philips became aware in February 1980 that Windmere had reached "an understanding" to acquire the SCHICK brand name. Philips subsequently predicted that if anyone bought the SCHICK name and used it to market Izumi rotary shavers, as Windmere was attempting to do, Philips would lose $15 million in sales and $2 million in profit during a three-year period, as well as five points in market share. Philips then bought the rights to the SCHICK brand name and used it to begin marketing a line of foil shavers. A Philips memorandum titled "FOIL SHAVER MARKETING OPPORTUNITY" noted that one "of the factors which have influenced our decision not to market this line [foil shavers] in the past" was because

> we [Philips] have been unwilling to commit the tens of millions of dollars required to establish an entirely new shaver brand in the U.S. market. Now, however, we are faced with a unique opportunity which may never come our way again. An established brand name is available for a relatively small investment. Virtually all roadblocks which

> have stood in the way of the foil line are eliminated by the availability of the brand name—SCHICK.

Philips' own economist expert testified that entry into Windmere's proposed markets was relatively easy. Philips also relied on the fact that following Windmere's entry into the rotary shaver market in 1984, Windmere obtained 3 to 5 percent of the total electric shaver market.

d. *Windmere's entry into the rotary shaver market and Philips' response.* As noted, in 1977 Windmere unsuccessfully had attempted to enter the foil shaver market. In the spring of 1984, Windmere again entered the electric shaver market with both foil and rotary shavers manufactured in Japan, which Windmere sold under the RONSON trademark.

Windmere introduced a cordless rotary (model RR-1) shaver for $34.99 and a corded rotary (model RR-2) shaver for $22. Windmere projected that, during its first six months in the shaver business, it would sell 125,000 razors for total dollar sales of more than $3 million. In the last nine months of 1984, Windmere actually sold more than 300,000 units for approximately $6 million. Windmere's 1984 annual report, prepared after it had filed its antitrust counterclaim, stated that "[d]espite a substantial loss of sales and revenues resulting from Philips, i.e., Norelco's business tactics the Ronson electric shavers represent the most successful new product line introduction in the history of the Company."

Philips had described Windmere as "a financially extremely healthy enterprise which is capable of making life very difficult for us." A Philips "report of decison taken at a management policy meeting" on January 5, 1984, stated: "If Windmere launches rotary shavers on the U.S. market,

Mr. Beasley [vice president of marketing for North American Philips Consumer Product Division] proposes to kill this stone dead by introducing old models at very low prices. . . ."

After Windmere introduced its Ronson shavers at a price lower than Philips' shavers, an April 20, 1984 Philips weekly report, for the week ending April 21, 1984, stated: "Ronson is getting a solid foothold and apparently is willing and able to pay a high price to get into our business. Let's pound them into the sand." The report suggested that Philips introduce the model "1320" cordless rotary shaver. The model 1320 was Philips' old model 1312, which had an expected retail price of $44 during 1979 to 1980.

The model 1320, however, was introduced at a distributor price of $27.08, which was approximately 31 percent less than the $39 price at which the same razor had been sold as the model 1312 four years earlier, and approximately 23 percent less than the comparable Ronson model. The introduction of the model 1320 was not mentioned in Philips' 1984 business plan, dated December 1983. Until the 1320, Philips had never introduced a new product at a lower price point.

Philips discussed the 1320 shaver in a March 1984 memorandum:

> Until later in the year, Norelco has decided on an absolute embargo on any form of publicity in connection with the introduction of the HP 1320. . . . The negative effect of any premature release of information on the HP 1320 or 1337 is feared, just at the very time when the intention is to introduce the 1320 as a complete addition to the line and not for it to take sales away from any of the existing

> range of standard shavers. . . . The question was asked whether it was the intention to include the 1320 in the line for 1985. Beasley and Co. have taken no clear position on this subject. *Given the likely impossibility of driving Windmere off the U.S. market completely,* we foresee that a non-retracting rechargeable shaver sold at an aggressive price level will persist on the market for a rather longer time and thus cannot be viewed as an incidental phenomenon, so to speak (emphasis added).

Philips later described the 1320 model as a "200th anniversary special to be out for a limited period of time."

A May 24, 1984 Philips memorandum stated: "As discussed at the policy meeting, we should attempt to formulate a short term strategy with regard to the competition represented by the Ronson trademark, which in the hands of Windmere Inc. of Florida has penetrated our market segment." The memorandum refers to a marketing strategy wherein

> [a] direct frontal attack on Ronson in the marketplace is probably the crudest and probably also one of the most expensive means at our disposal. This would involve, for example, us locating competing dealers at every address where Ronson is sold and selling Norelco and/or Philips shavers at a lower price. Furthermore, every challenge issued by Ronson in the form of actual discounts would have to be countered by offering even lower discounts. We can reward exclusivity by giving every dealer who does not sell Ronson shavers an extra discount of 5%.
>
> . . . .

> Total attack strategy, that is to say that just as Norelco is now doing, we would launch a multiplicity of activities against Windmere and at a later stage against any other competitor who appears on the scene.

The memo concludes that "legal measures" "should make life difficult for Ronson on every front where it is at all possible, on the basis of our patents" and that as a "tactical measure" Philips should "[b]uy Izumi, and quickly."

Windmere presented testimony that, after Philips introduced its model 1320, substantial orders ($2-2.5 million) were cancelled. No orders for Ronson products had been cancelled before the Philips 1320 was introduced.

The 1984 Philips marketing plan included a model 1615 corded rotary shaver. The 1615 was to have been sold to distributors for $27.99, who then would have sold the shavers at a retail price of $29.99. The price of the 1615, however, was dropped approximately 35 percent to a distributor price of $18.03, which was almost $4 less than the distributor price for Ronson's comparable corded rotary shaver.

Philips' response to Windmere's entry affected other models in its line. In its "Model policy 1985," discussed in May 1984, a twin-head model "1722" apparently was scrapped:

> Mainly on account of the action undertaken against Ronson as well as because of the very presence of Ronson on the market with its known price advantages, there is less room for this product on the American market than had been originally planned.

Another model, the "1622," was also affected:

> Although . . . this should be an expensive model on account of the enhanced specification compared with the HP 1620, it appeared from the discussion of this point that the matter of price was more important than the question of the specification. Norelco maintained their view despite the poor way in which sales of the HP 1620 had held up, even in the USA as well. Later the product discussion turned to the question of a frontal attack on Ronson. In this context, Groningen [Dutch Philips] quite clearly declared it was ready to drop the price of this product even below that of the HP 1620 ($8.15) provided that Norelco were ready to drop their gross margin by a considerable amount. Such a frontal attack on Ronson must certainly be accompanied by considerably more volume. . . .

In March 1985, one year after Windmere entered the electric shaver market, a Philips memo of a sales meeting and visits to buyers noted the damaging effect the 1615 and 1320 had on sales of other Philips models:

> The HP 1615 and the HP 1320 clearly eat in on the HP 1337, HP 1327D and the HP 1604/05/06. This is a dramatic development since it appears that the HP 1615, at a price point of $19.95 will be a disturbing development. It is clear that this is a planned development and that we cannot occupy ourselves "crying over spilled milk," but the fact remains nonetheless.

e. *Philips' alleged predatory pricing.* Windmere contended that Philips sold its 1320 and 1615 models below its average variable costs and sacrificed its short-term profits

on those models in order to drive Windmere out of the rotary shaver market. Windmere and Philips introduced into evidence various calculations directed to the question whether Philips sold below cost. As the parties framed the issue, the answer depended upon which of Philips' costs properly were allocable to those two models.

The parties vigorously disputed whether Philips' advertising expenses were a variable cost of those models and, if they were, the basis upon which advertising expenses should be allocated. Philips contended that there should be subtracted from the $17.5 million it spent for advertising in 1985 the approximately $6.6 million it received for advertising in that year from its Dutch parent, N.V. Philips. If that subtraction were made, there was evidence that Philips made a profit on the sales of the shavers. Philips also argued that advertising expenses should have been allocated as a percentage of expenses based upon revenues —an allocation under which Philips would have made a profit. Windmere disputed these assumptions and calculations based on them. Each side presented evidence justifying and supporting its position.

The parties also disputed the allocation of costs other than advertising. For example, Windmere relied upon its projections of Philips' 1985 costs of batteries, freight and handling. Philips contended that based on its actual, as distinguished from projected, costs for those items, it realized a profit on its sales. Windmere responded that because Philips' actual costs were not available to it, its calculations based upon projected costs were a reasonable basis for determining whether Philips' sales were at a profit.

f. *Windmere's withdrawal from the rotary shaver market.* In December 1985, less than two years after it introduced its Ronson rotary shaver, Windmere announced

its withdrawal from the rotary shaver market. (It remained in the foil market.) Shortly thereafter, Philips discontinued the sale of its 1320 and 1615 rotary shavers. At a 1986 housewares show, Philips stated that "[t]hey were closing [the model 1320] out and coming out with a new model at a higher price."

C. The Decision of the District Court Directing a Verdict on the Antitrust Counterclaim.

In an opinion explaining "in detail" its "reasons for granting" Philips' motion for a directed verdict, the district court stated that "reluctantly" it had found that "Windmere had failed to present substantial evidence sufficient to create a jury question on at least one element of its antitrust claims —the willful acquisition or maintenance of monopoly power via predatory pricing. . . ." (footnote omitted).

The court ruled that "Windmere presented a substantial amount of evidence to support its definition of the relevant market and to show that [Philips] had market power in this market." The court stated that "[t]he specific conduct which Windmere alleged was anticompetitive and showed Philips' intent to monopolize, was Philips[']' alleged predatory pricing scheme with regard to the sale of its model 1320 and 1615 rotary electric razors." The court held that under *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976), Windmere was required to show that Philips was " 'charging a price below [its] average variable cost in the competitive market,' " (quoting 517 F.2d at 724) and that "Windmere's evidence of below-cost pricing does not meet the substantial evidence standard necessary to withstand a directed verdict."

Court of Appeals Opinion

The court stated:

> The disputes regarding the evidence Windmere introduced to prove predatory pricing involve two primary issues: (1) the proper allocation of Philips['] advertising expenditures, and (2) the proper method of proving costs—i.e., by using actual costs or projections.

The court further stated that it was "undisputed that if all of Philips['] advertising expenditures are classified as fixed costs, that Philips['] prices for the model 1320 and 1615 razors exceeded their average variable cost." The court noted the testimony of Mr. Kamerschen, Philips' expert, that "based on his review of Norelco's business and media plans, which he stated contained the type of information an economist would generally rely upon in order to make a judgment of this kind, that Norelco's advertising was a fixed cost," and stated that "Windmere failed to bring forth any information to the contrary on the cross-examination of this witness" (record reference omitted). The court ruled that the evidence upon which Windmere relied to show that advertising was a variable expense—Norelco's "1984 income statements . . . which listed advertising in a category entitled variable expenses"—was insufficient because "such an accounting record cannot alone support the classification of advertising as a variable expense for economic purposes" (record reference omitted).

The court further held that "[e]ven assuming, however, that advertising expenses here are properly characterized as variable costs, there is a question whether cooperative advertising support given to Norelco by NVP should be deducted before determining whether Norelco priced the 1615 and 1320 below its average variable cost." It rejected, as "wholly unsupported" by the evidence, Windmere's "con-

tention" that the approximately $6.6 million Philips received "in advertising support from NVP in 1985" either was not actually paid or was in adidtion to and not a part of the $17.5 million Norelco spent for advertising in 1985. The court also held that Windmere had not introduced sufficient evidence to justify submitting to the jury Windmere's contention that the advertising expenses should be allocated to the 1615 and 1320 models "on a per unit basis" (footnote omitted). Finally, the court rejected Windmere's evidence of the cost of batteries, freight and handling because that evidence was based on "*projections* of the 1985 year" (emphasis in original).

II

A. This court has exclusive jurisdiction over an appeal from a final judgment where the jurisdiction of the district court was based in whole or in part on 28 U.S.C. § 1338(a) (1982). 28 U.S.C. § 1295(a)(1)(1982). In filing its complaint against Windmere and Izumi for patent infringement, Philips invoked the jurisdiction of the district court under section 1338(a). Although Windmere's antitrust counterclaim, which is the subject of this appeal, did not invoke the district court's jurisdiction under that section, our appellate jurisdiction depends upon the nature of the case in the district court and not upon the issues presented to us for review. *See In re Innotron Diagnostics,* 800 F.2d 1077, 1080, 231 USPQ 178, 180-81 (Fed. Cir. 1986) ("the mere presence in a case of 'issues' other than those within a substantive field within this court's exclusive appellate jurisdiction [does not] oust this court of the jurisdiction it must and would otherwise exercise in carrying out its mission."); *see also Atari, Inc.* v. *JS & A Group, Inc.,* 747 F.2d 1422, 1431, 223 USPQ 1074, 1080 (Fed. Cir. 1984) (en banc).

In the present case, the jurisdiction of the district court over this case was based in part on section 1338(a). That fact gives us jurisdiction over this appeal, even though the appeal presents no questions under the patent laws. *See, e.g., In re Innotron Diagnostics,* 800 F.2d at 1080, 231 USPQ at 180 (where patent complaint was consolidated with antitrust complaint, the Federal Circuit had exclusive jurisdiction over appeal from final judgment); *Cable Elec. Prods., Inc.* v. *Genmark, Inc.*, 770 F.2d 1015, 1029, 226 USPQ 881, 890 (Fed. Cir. 1985) (where district court exercised jurisdiction over patent count under § 1338(a), the Federal Circuit has jurisdiction, under § 1295(a), to review the appeal of the nonpatent counts).

B. In determining whether the district court correctly directed a verdict on Windmere's antitrust counterclaim, we apply the law of the regional circuit in which the district court sits to determine both the appropriateness of a directed verdict and the antitrust law questions. *Power Controls Corp.* v. *Hybrinetics, Inc.*, 806 F.2d 234, 237, 231 USPQ 774, 776 (Fed. Cir. 1986); *Loctite Corp.* v. *Ultraseal Ltd.*, 781 F.2d 861, 875, 228 USPQ 90, 99 (Fed. Cir. 1985) ("We must approach a federal antitrust claim as would a court of appeals in the circuit of the district court whose judgment we review."); *Panduit Corp.* v. *All States Plastic Mfg. Co.*, 744 F.2d 1564, 1574-75, 223 USPQ 465, 471 (Fed. Cir. 1984).

We thus "apply [Eleventh] Circuit law primarily and look to guidance (albeit non-binding) from other circuits, especially in uncharted areas." 781 F.2d at 875, 228 USPQ at 99-100. Since the Eleventh Circuit treats as binding decisions of the Fifth Circuit rendered before October 1, 1981, when the Eleventh Circuit came into being, *Bonner* v. *City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir.

1981) (en banc), we also apply those earlier Fifth Circuit decisions.

In the Eleventh Circuit, "[t]o avoid a directed verdict, [Windmere] must have presented sufficient evidence to create a jury question with respect to each element of [its] case." *Malcolm* v. *Marathon Oil Co.*, 642 F.2d 845, 848 (5th Cir. Unit B April), *cert. denied*, 454 U.S. 1125 (1981).

> In determining whether there is sufficient evidence to submit a case to the jury following a motion for directed verdict, the district court should consider all evidence and not just evidence supporting the non-mover's case. The evidence must be considered in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable persons could not reach a different conclusion, the Court should direct a verdict.

Gregory v. *Massachusetts Mut. Life Ins. Co.*, 764 F.2d 1437, 1440 (11th Cir. 1985). *See also Boeing Co.* v. *Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc) (for evidence to be sufficient to create a jury question it must be of a quality and weight that reasonable, impartial, and fair-minded jurors might reach different conclusions).

In *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Supreme Court held that the standard for granting summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure "mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could

differ as to the import of the evidence, however, a verdict should not be directed." *Id.* at 250-51 (citation omitted). The Court pointed out that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

III

"The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). The district court recognized, and Philips does not dispute, that "Windmere presented a substantial amount of evidence to support its definition of the relevant market [rotary electric shavers] and to show that [Philips] had market power in this market." The question before us, therefore, is whether Windmere presented sufficient evidence to entitle it to go to the jury on the second element of monopolization: whether Philips willfully had maintained its monopoly power in the rotary shaver market.

The district court viewed the essence of Windmere's case on the second element as "the willful acquisition or maintenance of monopoly power via predatory pricing," and used, as the standard for determining "predatory pricing," pricing "below average variable cost." The court concluded that Windmere had failed to present substantial evidence that

Philips had priced its 1615 and 1320 rotary shavers below Philips' average variable costs.

We conclude, however, that the district court took too narrow a view of the kind of evidence that will support the second element of monopolization and of the bases of Windmere's claims. Moreover, even under the district court's narrow view of Windmeres' theory, Windmere presented sufficient evidence of predatory pricing to preclude a directed verdict on that issue.

A. There was evidence from which the jury could have concluded:

> 1. That entry barriers to the rotary electric shaver market are substantial, if not high—the need to have a well-known brand with wide consumer acceptance, the limited number of brands that satisfy this requirement, and the substantial advertising expenditures required to attain a foothold in the market.
>
> 2. That Philips introduced its lower-priced older models only in response to Windmere's entry into the market with its cheaper Ronson rotary electric shover.
>
> 3. That Philips cut the price of its shavers in an endeavor to eliminate Windmere from the market. Mr. Beasley proposed that if Windmere started selling rotary shavers in the United States market, Philips should "kill this stone dead by introducing old models at very low prices . . ." A Philips weekly report, made after Philips had introduced its rotary shaver, suggested: "Let's pound them into the sand." A Philips memorandum referred to "the likely impossibility of driving Windmere off the U.S. market completely . . . ." Although Philips attempts to discredit this evidence as mere sales talk, it was

for the jury to determine what weight and significance this evidence had.

That this purpose of Philips was further shown by the evidence that, when Windmere withdrew from the rotary shaver market, Philips promptly discontinued the sale of its lower-priced old model.

4. That Philips' willful maintenance of its monopoly position was further shown by Philips' prior acquisition of the SCHICK brand name after it had learned about an understanding between Windmere and Schick for Windmere to acquire that name.

To be sure, Philips introduced evidence designed to show that its actions were legitimate competitive responses prompted by the entry of Windmere into the market. The evaluation of all the evidence bearing on the nature of Philips' actions and the inferences to be drawn from the evidence, was for the jury to determine. If the jury had credited Windmere's evidence and rejected Philips', it could have returned a verdict for Windmere. Evidence that a firm holding 90 percent of a market that has substantial entry barriers drastically slashes its prices in response to the competition of a new entrant, for the purpose and with the effect of eliminating that entrant, is sufficient to show monopolization, in violation of section 2 of the Sherman Act. *Cf. Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11 (1985); *American Tobacco Co.* v. *United States*, 328 U.S. 7881 (1946).

B. Even under the district court's view that Windmere's case rested on its claim that Philips had sold below average variable cost, the evidence was sufficiently in conflict to require submission of the issue to the jury and precluded a directed verdict. As the district court noted, the determination whether Philips sold below average variable cost

required resolution of two issues: (1) whether Philips' advertising expenses were variable or fixed costs and, if variable, whether the advertising allowance Philips received in 1985 from its Dutch parent should be deducted from Philips' own advertising expenditures; and (2) whether Windmere's projections for certain items of Philips' cost—batteries, freight and handling—were sufficient to establish those costs. The district court held that on both of these elements of its case, Windmere failed to present sufficient evidence to create disputed factual issues for the jury. We disagree.

1. In ruling that Windmere had not presented substantial evidence that Philips' advertising expenses were variable rather than fixed costs to create a jury question on that issue, the district court relied on the testimony of Philips' economist expert, Mr. Kamerschen, that the Norelco advertising was a fixed cost, and stated that "Windmere failed to bring forth any information to the contrary on the cross-examination of this witness." It was for the jury, however, and not for the court, to determine the credibility of this witness and the weight to be given his testimony. The jury was not required to accept his expert testimony, even if it was uncontradicted. *See Quock Ting* v. *United States,* 140 U.S. 417, 420 (1891) ("There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony."). *See also Archer* v. *Commissioner,* 227 F.2d 270, 273 (5th Cir. 1955); *Boyett* v. *Commissioner,* 204 F.2d 205, 208 (5th Cir. 1953).

To counter Mr. Kamerschen's opinion, Windmere relied on Norelco's 1984 income statements, "which listed advertising in a category entitled variable expenses." The court rejected this evidence as insufficient to create an issue for the jury because "[i]t is clear that such an account-

ing record cannot alone support the classification of advertising as a variable expense for economic purposes." As was the case with Mr. Kamerschen's expert testimony, however, this was evidence that the jury was entitled to consider in determining whether the advertising expenses were variable or fixed costs. Indeed, the Areeda and Turner antitrust treatise, which the district court cited as authority for rejecting Philips' own characterization of its advertising expenses as variable costs, states that "we have defined marginal and average variable cost to include advertising and other promotional expenditures." 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 721a, at 191 (1978).

Similarly, we conclude that, in determining the amount of Philips' advertising expenses that are variable costs, the proper treatment of the approximately $6.6 million Philips received from its Dutch parent in 1985 was an issue for the jury to decide.

2. The question whether Philips' advertising expenses should be allocated to the 1615 and 1320 models on a per unit basis or on the basis of revenue received also was a matter for the jury and not for the court to decide. We reach that same conclusion with respect to the propriety of Windmere's use of 1986 projections, rather than Philips' actual operating costs (which apparently were not available to Windmere), to determine Philips' costs of batteries, freight and handling.

IV

It is unfortunate that, as a result of our decision, the lengthy and complex issues involved in Windmere's antitrust counterclaim will have to be retried. That, however, is the consequence of the district court's directing a verdict rather than allowing the case to go to the jury. As the

Eighth Circuit stated, in language that applies equally to this case:

> In short, the case was not clear enough to justify a directed verdict. If this case had been tried to the court, we would have had no difficulty in affirming, as not clearly erroneous, a finding for [Philips] supported by the opinion the District Court rendered here. But this case was not tried to the court. It should have been permitted to go to the trier of fact.

Dace v. *ACF Indus., Inc.*, 722 F.2d 374, 379 (8th Cir. 1983). The court continued in a footnote:

> This case illustrates again that it is usually better practice for a district court, faced with a motion for directed verdict, to allow the case to go to the jury, and address the issue by way of judgment n.o.v. if necessary. The jury may find for the moving party in which case the issue disappears. If the verdict is against the moving party, and if judgment n.o.v. is granted, and if this Court decides on appeal that it should have been denied, the verdict can simply be reinstated, and no new trial is necessary.

Id. at 379-80 n.9. Accord *Mattivi* v. *South African Marine Corp., "Huguenot"*, 618 F.2d 163, 166 n.2 (2d Cir. 1980); *Jamesbury Corp.* v. *Litton Indus. Prods., Inc.*, 839 F.2d 1544, 1550, 5 USPQ2d 1779, 1784 (Fed. Cir. 1988).

CONCLUSION

The order of the district court granting a directed verdict against Windmere on its antitrust counterclaim is reversed, and the case is remanded to the district court for a new trial on that counterclaim.

REVERSED AND REMANDED.

NEWMAN, *Circuit Judge,* with whom MARKEY, *Chief Judge,* joins, dissenting.

I respectfully dissent, for I believe that the district court correctly directed a verdict in favor of the Philips companies with respect to the asserted violation of Section 2 of the Sherman Act.

Perhaps a more cautious, or less confident, style of trial management would have been to allow the jury to reach a verdict and then review the decision. However, the law of the Eleventh and Fifth Circuits fully supports the procedure followed. *See, e.g., J&H Auto Trim Co.* v. *Bellefonte Insurance Co.,* 677 F.2d 1365, 1368 (11th Cir. 1982) ("There must be a conflict in substantial evidence to create a jury question." (quoting *Boeing Co.* v. *Shipman,* 411 F.2d 365, 375 (5th Cir. 1969) (en banc)); *Malcolm* v. *Marathon Oil Co.,* 642 F.2d 845, 848 (5th Cir.) (the non-moving party must present evidence sufficient to create a jury question as to each element of the claim), *cert. denied,* 454 U.S. 1125 (1981).

In a carefully reasoned opinion, applying the standards of the Supreme Court and the Eleventh and Fifth Circuits, the district court held that Windmere's evidence was "simply insufficient to permit the trier of fact to find facts in connection with this matter." Review of the record and arguments shows that the district court was correct when it held that, as a matter of law, Windmere had not adduced sufficient evidence to support a jury verdict in its favor on the asserted Section 2 violation. The most stalwart defender of jury trials must also defend the authority of the trial judge to manage the trial and, when appropriate, to direct the verdict. *Galloway* v. *United States,* 319 U.S. 372, 392-395 (1943).

Court of Appeals Opinion

A.

In response to a suit for patent infringement and for unfair competition (based on trade dress), Windmere asserted a counterclaim of monopolization and attempt to monopolize against the Philips companies under Section 2 of the Sherman Act. Other antitrust counterclaims, also decided against Windmere on the ground of insufficient evidence, are not before us.

The district court stated that "Windmere had failed to present substantial evidence sufficient to create a jury question on at least one element of its antitrust claim—the willful acquisition or maintenance of monopoly power via predatory pricing". The district court held, correctly, that unless Windmere were able to create a jury question on this element, Windmere could not prevail on its Sherman Act charge. *See Malcolm* v. *Marathon Oil, supra.*

The court thus concentrated on Windmere's evidence on the issue of predatory pricing and concluded that, as a matter of law, Windmere had not presented sufficient evidence to create a jury question on the essential premises thereof. Applying *United States* v. *Grinnell Corp.,* 384 U.S. 563, 570-571 (1966), the district court observed that it is not illegal to lower one's price in view of competition, (or in this case to bring in additional models at low price, without lowering the price of the existing models) unless in so doing the pricing is "predatory". The applicable law on determination of predatory pricing has recently been reviewed in *Cargill, Inc.* v. *Monfort of Colorado, Inc.,* 479 U.S. 104, 117 n.12 (1986), as follows:

> No consensus has yet been reached on the proper definition of predatory pricing in the antitrust context, however. For purposes of decision in *Mat-*

> *sushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), for example, we defined predatory pricing as either "(i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." *Id.*, at 585, n.8. Definitions of predatory pricing also vary among the Circuits. Compare *Arthur S. Langenderfer, Inc.* v. *S. E. Johnson Co.*, 729 F.2d 1050, 1056-1057 (CA6) (pricing below marginal or average variable cost presumptively illegal, pricing above such cost presumptively legal), *cert. denied*, 469 U.S. 1036 (1984), with *Transamerica Computer Co.* v. *International Business Machines Corp.*, 698 F.2d 1377 (CA9) (pricing above average total costs may be deemed predatory upon showing of predatory intent), *cert. denied*, 464 U.S. 955 (1983).

The district court, following this direction, looked to the precedent of its own circuit for elaboration of the method of determining predatory pricing. In *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976), the Fifth Circuit held:

> In short, in order to prevail as a matter of law, a plaintiff must at least show that either (1) a competitor is charging a price below his average variable cost in the competitive market or (2) the competitor is charging a price below its short-run, profit-maximizing price and barriers to entry are great enough to enable the discriminator to reap the benefits of predation before new entry is possible. [footnotes omitted]

The first of the two *International Air* tests, pricing below average variable cost, was the lesser standard for Windmere to meet. It is a commonly used test for predatory pricing in the Fifth Circuit, *see, e.g., Adjusters Replace-A-Car Inc.* v. *Agency Rent-A-Car Inc.*, 735 F.2d 884 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); and in other circuits, *see, e.g., MCI Communications Corp.* v. *American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.) (criticizing the profit maximizing test), *cert. denied*, 464 U.S. 891 (1983); *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 236 (1st Cir. 1983); *Northeastern Telephone Co.* v. *American Tel. & Tel. Co.*, 651 F.2d 76, 87-88 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Southern Pacific Comm. Co.* v. *American Tel. & Tel. Co.*, 556 F. Supp. 825, 927, 964 (D.D.C. 1983), *aff'd*, 740 F.2d 1011 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985).

From the record and argument, it is apparent that Windmere's only way of attempting to show price below average variable cost was by including Philips full advertising costs as variable costs, attributed per unit to the reintroduced obsolete models 1320 and 1615. Although the parties argue the point on this appeal—the majority opinion refers to a "vigorous dispute"—the district court looked to the evidence.

The district court found that Windmere had presented "no record evidence" to support either its method of allocation of advertising costs or its challenge to the total advertising expenditures; and that on Norelco's established advertising expenditures of $17,558,000, of which $6.6 million was paid by NVP, "even according to the testimony of Windmere's Vice President of Finance, Burton Honig, Norelco achieved a profit on the sale of the 1320 and 1615

in 1985". Although Windmere argues the arithmetic on appeal, there was no *evidence* to the contrary. Argument of counsel is not evidence, as the Fifth Circuit has discussed:

> Unsupported, self-serving testimony is not substantial evidence sufficient to create a jury question. *Yoder Brothers, Inc.* v. *California-Florida Plant Corp.*, 537 F.2d 1347, 1371 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094, 97 S. Ct. 1108, 51 L. Ed. 2d 540 (1977). Similarly, inferences cannot stand in the face of uncontradicted and substantial evidence to the contrary. *Scott Medical Supply Co.* v. *Bedsole Surgical Supplies, Inc.*, 488 F.2d 934, 937 (5th Cir. 1974).

Comfort Trane Air Conditioning Co. v. *Trane Co.*, 592 F.2d 1373, 1383 (5th Cir. 1979). *Accord Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848, 858 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978) (affirming directed verdict for a defendant on a predatory pricing claim because of the inadequacy of plaintiff's accounting evidence: "a firm's marginal costs cannot be ascertained from conventional business records. Conventional records do not provide information which a jury can use as evidence of marginal cost.")

The district court remarked on the absence of evidence of any advertising whatsoever of the 1615 and 1320 models; and the court observed that Windmere had the burden of proof. Referring to Windmere's reliance on its proposed projections of Philips' costs rather than actual cost data, the district court held that "[a]lthough some use of projections undoubtedly is necessary, we find that where such use alone makes the difference between a loss or a profit on an item that use is too extensive." The district court cited

the Supreme Court in *Matsushita Electric Inc. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) on the necessity of "direct evidence" of predatory pricing schemes.

Following the guidance of *Matsushita,* the district court concluded that "Windmere's evidence of below-cost pricing does not meet the substantial evidence standard necessary to withstand a directed verdict." No error has been shown in the district court's careful analysis of the evidence presented, or in its conclusion that the minimum evidentiary standards on which a jury could have reached a verdict of predatory pricing had not been met.

B.

Windmere argues in the alternative that the district court should have applied to its pricing analysis the second standard of *International Air,* 517 F.2d at 724, *viz.* that "the competitor is charging a price below its short-run, profit-maximizing price and barriers to entry are great enough to enable the discriminator to reap the benefits of predation before new entry is possible." The Fifth Circuit Court explained the profit maximizing test as follows:

> This standard should be applied only when the barriers to entry are extremely high. The lower the barriers to entry in a market, the closer to marginal cost a monopolist would have to set its price in order for a plaintiff to prevail as a matter of law, for we see no social utility in insuring the survival of inefficient firms where a new entry is possible.

International Air, 517 F.2d at 725 n.31.

The district court did not rely in its decision on the presence or absence of barriers to entry, presumably because Windmere did not argue that it encountered any

actual barriers. It was undisputed that the Izumi shavers, labeled with the Ronson trademark, experienced no entry barriers whatsoever. In its first year Windmere sold six million dollars' worth, double its projections. In its 1984 Annual Report Windmere stated:

> The most exciting new product introduced in 1984 was the Ronson shaver line, which included three microfoil and two rotary shavers. We were successful in gaining distribution of our shavers to many of the major retailers in America. This was the most successful product introduction in the Company's history.

Windmere's sole argument as to entry barriers is based on its reference to negotiations for the SCHICK trademark—an event whose significance is belied by Windmere's apparently ready acquisition of the Ronson mark, and its immediate market success. *Accord, D.E. Rogers Associates, Inc.* v. *Gardner-Denver Co.*, 718 F.2d 1431, 1434 (6th Cir. 1983), *cert. denied*, 467 U.S. 1242 (1984) (ease of entry shows lack of barriers to entry). In addition, Windmere's Vice President of Sales testified that the Sunbeam brand name was available and could be used to market electric shavers.

Since Windmere did not meet the threshold burden, under the profit-maximizing test, of presenting evidence whereby a jury could find that it experienced high barriers to entry, I respectfully disagree with my colleagues' reliance on entry barriers as contributing substantial evidence for the jury: this is the first of the majority's four-point basis for remand for jury trial. Nor can I agree that it is probative of violation of the Sherman Act to introduce a lower-price model in response to a competitor's low-price model (the ma-

jority's second point); or to engage in vigorous price competition (the majority's third point). The fourth point, on which the negotiations concerning the SCHICK trademark were relied on as evidence of intent to monopolize, even if established, is not probative without below-cost pricing. Industrial competition is not benevolent, and causing loss of profits to a competitor, or making the market less attractive to a competitor, whereby a less efficient or higher cost competitor leaves the market, is not itself a violation of antitrust law. As stated in *Ball Memorial Hospital, Inc.* v. *Mutual Hospital Ins.*, 784 F.2d 1325, 1338, 1339 (7th Cir. 1986):

> [I]ntent to harm rivals is not a useful standard in antitrust. . . . Vigorous competitors intend to harm rivals, to do all the business if they can. To penalize this intent is to penalize competition.

Windmere's position, simply put, is that Philips was obliged to preserve its pricing at the levels of the *status quo ante*, and neither reduce its price nor bring in a lower-price model. Windmere refers approvingly to Remington's failure to reduce its prices when Windmere introduced its Ronson brand foil razor. Thus Windmere argues that Philips must be barred by the antitrust laws from pricing its obsolete 1320 and 1615 models at lower prices than those at which they had sold when they were the current models (the 1615 having been offered at $28.00 some years before, and now reoffered at $17.50), since the purpose was to offer these models at a lower price than that at which Windmere was offering the Izumi shaver.

It is not the law that Philips was required to preserve its prices and products as they were before Windmere offered the Izumi product at a lower price. "It is not anticompetitive for a company to reduce prices to meet lower prices

already being charged by competitors. Indeed, '[t]o force a company to maintain non-competitive prices would be to turn the antitrust laws on their head.' " *D.E. Rogers,* 718 F.2d at 1435 (citations omitted) (quoting *Richter Concrete Corp.* v. *Hilltop Concrete Corp.,* 691 F.2d 818, 826 (6th Cir. 1982)). The district court applied this principle in its statement that "[p]rice cutting between competitors as a general rule is precisely the type of conduct our laws are designed to promote." Pertinent is the Supreme Court's recent discussion in *Matsushita,* 475 U.S. at 594:

> But cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. See *Monsanto,* supra, at 763-764, 79 L. Ed. 2d 775, 104 S. Ct. 2378. "[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Barry Wright Corp.* v. *ITT Grinnell Corp.,* 724 F.2d 227, 234 (CA1 1983).

The district court considered Windmere's arguments as to the applicable precedent, including a careful analysis of *Aspen Skiing Co.* v. *Aspen Highlandds Skiing Corp.,* 472 U.S. 585 (1985). The court, for the purpose of this motion, accepted Windmere's definition of the relevant market as limited to rotary shavers, but did not agree with Windmere that it is always a violation of the Sherman Act to reduce prices if the result is to "deliberately remove competitors," in Windmere's words, or that Philips was required to refrain from reacting to Windmere's importation of the

Izumi product. The court, following *International Air*, held that it is insufficient evidence of Sherman Act violation to show that a "large entrenched firm with a dominant market share," *id.* at 721, reduced its prices in "a program of stunting the possible growth of [the new entrant]." *Id.* at 719. The court held, as *International Air* requires, that it is also necessary to show that the sales were below average variable cost. *Id.* at 724. It is not the law that a dominant company must make room for new entrants.

The Fifth Circuit has discussed the role of intent, stating in *Adjusters Replace-A-Car, Inc.* v. *Agency Rent-A-Car, Inc.*, 735 F.2d 884, 887 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) that:

> A statement of intent to compete . . . even if perceived as a threat is not unlawful. Such a manifestation of intent to triumph in the competitive market, in the absence of unfair, anticompetitive or predatory conduct, is not enough to establish an antitrust violation.

(quoting *Hayes* v. *Solomon*, 597 F.2d 958, 977 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980). It is not the purpose of the antitrust laws to require that a lawful monopolist "hold[] an umbrella over inefficient competitors". *Olympia Equipment Leasing Co.* v. *Western Union Telegraph Co.*, 797 F.2d 370, 375 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1574 (1987).

> Today it is clear that a firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches.

Id. at 375.

Philips was not required to limit its products to those pre-existing at higher prices, to provide an "umbrella" for the importation by Windmere of the cheaper Izumi model, or to refrain from selling an even cheaper model, even for a limited time. The standard of the Fifth and Eleventh Circuits is that an essential element of a Section 2 violation is proof of sale below a fair measure of cost, as discussed in *International Air*. We, sitting in review of the district court's application of Fifth/Eleventh Circuit law, are unauthorized to set a different standard.

C.

The district court concluded that there was insufficient evidence to create a jury question on whether Philips was pricing the re-introduced models below cost. It was the trial court's obligation to assure that the jury was presented with evidence, not appeals to "passion and prejudice". *Connell* v. *Sears Roebuck & Co.*, 722 F.2d 1542, 1546 (Fed. Cir. 1983). The Court stated in *Zenith Radio Corp.* v. *Hazeltine Research Inc.*, 395 U.S. 100, 124 (1969), that "speculation and guesswork" can not support a verdict of antitrust violation. *See also Comfort Travel Air Condition Co.* v. *Trane Co.*, 592 F.2d 1373, 1383 (5th Cir. 1979) (directed verdict granted when plaintiff failed to present substantial evidence that defendant's illegal antitrust activities were a material cause of plaintiff's injuries). *Accord Broadway Delivery Corp.* v. *United Parcel Service, Inc.*, 651 F.2d 122, 131 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981) (motion to dismiss after jury trial granted because plaintiff's proof "did not permit a reasonable fact-finder [to make] a careful assessment of the relationship between the defendants' prices and costs"); *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 708 F.2d 1081, 1125,

1126, 1127 (7th Cir.) (affirming a directed verdict for defendant on a predatory pricing claim because of insufficient evidence), *cert. denied*, 464 U.S. 891 (1983); *Janich Brothers, Inc.* v. *American Distilling Co.*, 570 F.2d 848, 858 (9th Cir. 1977) (jury verdict set aside because of insufficient evidence of predatory pricing), *cert. denied*, 439 U.S. 829 (1979). *See generally* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975).

The district court correctly concluded that Windmere had not adduced sufficient evidence to create a jury question of its Section 2 Sherman Act claim, as a matter of law. The court thus acted within its authority in directing the verdict on this issue, and should be affirmed.

APPENDIX B

Opinion of the District Court, June 8, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE No. 84-2508-CIV-MARCUS

U.S. PHILIPS CORPORATION and NORTH AMERICAN PHILIPS CORPORATION,

Plaintiffs,

vs.

WINDMERE CORPORATION and IZUMI SEIMITSU KOGYO KABUSHIKI KAISHA,

Defendants.

THIS CAUSE came before the Court during the course of a jury trial upon the motions of U.S. Philips Corporation ("USP"), North American Philips Corporation ("NAPC") and N.V. Philips Gloeilampen Fabrieken ("NVP") for a Directed Verdict as Counterdefendants (USP and NAPC) and Third Party Defendant (NVP) on Counts I and II of Windmere Corporation's ("Windmere") and Izumi Setimitsu Kogyo Kabushiki Kaisha's ("Izumi") Counterclaim against USP and NAPC, and third party claim against NVP. On April 17, 1986, at the close of Windmere's antitrust case, USP, NAPC and NVP moved for a directed verdict on Windmere's counterclaim. At that time, Windmere withdrew its claims under the Robinson-Patman Act (Count III), Florida State Law (Count V) and the Clayton Act (Count VII). The Court heard oral argument on the remaining claims under Sections 1 and 2 of the Sherman Act on that date. Subsequently all parties submitted supplemental memoranda addressing the remaining counts, as well as questions raised by the Court at oral argument.

District Court Opinion

In their supplemental memorandum, USP and NAPC alleged that they were entitled to a directed verdict because Windmere had failed to offer substantial evidence that Norelco sold its Model 1320 and 1615 razors below average variable cost and that any evidence it had offered was insufficient to avoid a directed verdict. NVP alleged in its supplemental memorandum that Windmere had failed to offer substantial evidence that NVP had monopolized or attempted to monopolize any relevant market or that NVP and Norelco were separate entities capable of conspiring under § 1 of the Sherman Act. In response, Windmere claimed that it did not have to show that Norelco maintained its monopoly by predatory acts in order to prove its monopolization claim, or alternatively, that if proof of predatory acts was necessary, that Windmere had produced sufficient evidence of them to withstand a directed verdict motion. Reluctantly we found that Windmere had failed to present substantial evidence sufficient to create a jury question on at least one element of its antitrust claims—the willful acquisition or maintenance of monopoly power via predatory pricing [1]—and accordingly we granted USP, NAPC and NVP's motions for a directed verdict in open court on April 22, 1986. On April 22, 1986, a jury returned a verdict for Plaintiffs on their patent infringement claim and for Defendants on the unfair competition claim. We revisit the directed verdict motions now to set forth our reasons for granting them in detail.

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[1] The failure to prove predatory pricing is also fatal to Windmere's Section 1 claim against NVP. *See Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 106 S.Ct. 1348 (1986) (Section 1 case which alleged predatory pricing).

District Court Opinion

I. THE PARTIES

USP is a Delaware corporation which holds intellectual property rights. NAPC is a Delaware corporation which is engaged in a diversified line of commerce. It is a publicly held corporation with stock traded on the New York Stock Exchange. One of its divisions has been selling electric razors (foil) since 1948 and rotary electric razors since 1963. The brand name for the rotaries is Norelco. NVP is related to NAPC in the following way: NVP is a Netherlands corporation wholly owned by the shareholders of N.V. Gemeenschappelijk Bezit van Aandelen Philips' Gloeilampenfabricken ("Bezit"), a Netherlands corporation. Bezit is the beneficiary of United States Philips Trust, which holds 60% of the common stock of NAPC. Answer of NVP to Amended Third Party Complaint, at 2, Para. 4.

Windmere is a Florida corporation engaged in various lines of commerce in the United States. Windmere began marketing rotary razors under the Ronson trade name in 1984. Izumi is a Japanese corporation which manufactures and sells electric razors to Windmere.

This action was commenced in October 1984 with the filing of a Complaint by Plaintiffs USP and NAPC against Windmere and Izumi for patent infringement and unfair competition. The essence of the Complaint was that Windmere's Ronson rotary razors violated Plaintiffs' patents on Norelco rotaries, and that Windmere created confusion among consumers by marketing the Ronson razor to appear as if it were nearly identical to the Norelco rotaries. While the patent infringement claim was directed against both Windmere and Izumi, the unfair competition claims were directed only at Windmere.

Izumi counterclaimed against USP and NAPC seeking declaratory judgment concerning U. S. letters Patent No. 4,227,301, which was the patent purportedly infringed by Izumi. Izumi contended that the patent issued was invalid. Windmere counterclaimed against USP and NAPC, Plaintiffs, and against NVP as a third party defendant. The only remaining counts were Counts I and II. Count I was brought under Section 2 of the Sherman Act, 15 U.S.C. § 2, and alleged an unlawful attempt by USP, NAPC and NVP to monopolize, and monopolization of the electric shaver market and the rotary shaver submarket in the United States. Count II alleged a conspiracy to restrain trade in the electric shaver market and rotary submarket between NAPC, USP, and NVP.

II. DIRECTED VERDICT STANDARD

The standard to be applied to a directed verdict motion has been stated by the Eleventh Circuit as follows:

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach

> different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

L.A. Draper & Son, Inc. v. *Wheelabrator-Frye, Inc.*, 735 F.2d 414, 419-20 (11th Cir. 1984), *aff'd in part and rev'd in part on other grounds*, 813 F.2d 332 (11th Cir. 1987) (quoting *Boeing Co.* v. *Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1976) (en banc).

In order to withstand a directed verdict motion, the non-moving party must present *substantial evidence* sufficient to create a jury question with respect to each element of its claim. *Malcolm* v. *Marathon Oil Co.*, 642 F.2d 845, 848 (5th Cir. 1981), *cert. denied*, 454 U.S. 1125 (1981). "Unsupported, self-serving testimony is not substantial evidence sufficient to create a jury question." *Comfort Trane Air Conditioning Co.* v. *Trane Co.*, 592 F.2d 1373, 1383 (5th Cir. 1979) (citations omitted). "Similarly, inferences cannot stand in the face of uncontradicted and substantial evidence to the contrary." *Id.* (citation omitted).

USP, NAPC, and NVP acknowledged the strict standard for a directed verdict yet strongly urged that a directed verdict was appropriate because Windmere had failed to present substantial evidence sufficient to create a jury question primarily on its predatory pricing allegations.

As we have noted, Counts I and II alleged a monopoly, an attempt to monopolize and restraint of trade against USP, NAPC and NVP. Windmere alleged that NVP was the parent of USP and NAPC and that the three corporations were really a single economic unit acting in violation of Section 2 of the Sherman Act. Alternatively, Windmere alleged that NVP conspired with USP and NAPC in violation of Section 1 of the Sherman Act. While NVP moved separately for a directed verdict in its favor, many of the same arguments advanced by USP and NAPC applied to NVP as well.[2]

III. THE SHERMAN ACT

In *United States* v. *Grinnell Corp.*, the Supreme Court stated that a Section 2 Sherman Act violation consists of the following elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." 384 U.S. 563, 570-71 (1966). Moreover, to establish an attempt to monopolize, the plaintiff must show a specific intent to monopolize and a dangerous probability of achieving a monopoly in the relevant market.

As we noted in our summary judgment Order of April 8, 1986, the crucial issue in antitrust analysis often is a determination of the alleged monopolists' market power. Furthermore, the threshold fact question in determining market power is definitional—what is the relevant market.

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[2] Thus, we shall refer to USP, NAPC, and NVP collectively as "Philips" hereinafter.

See, e.g., Grinnell, 384 U.S. at 570-71. In accord with the importance of these determinations, Windmere presented a substantial amount of evidence to support its definition of the relevant market and to show that USP, NAPC and NVP had market power in this market. Windmere's memorandum in opposition to the directed verdict motion entitled "Windmere's Theories of Liability" also thoroughly covered these arguments. Market power, however, is not the sole element of a Sherman 2 violation. Although Windmere claimed at oral argument that the Sherman Act "prevents monopoly," this is simply not so. As is clear from the *Grinnell* test, the Sherman Act prohibits only those monopolies that are *willfully* acquired or maintained as distinguished from those that result from a superior product, business acumen or historic accident. Thus, even assuming that USP, NAPC, and NVP had market power in Windmere's proposed relative market, as we did for purposes of this motion, Windmere still had to prove the "willfulness" or intent element in order to meet the requirement that it present substantial evidence on each element of its claim. Accordingly, it is the evidence with respect only to this element of a Sherman 2 violation that we shall review.

A. *Monopolistic Intent*

Specific intent to monopolize is an element of an attempt to monopolize claim under § 2, but in cases of actual monopolization, the intent required under § 2 is a general intent —a specific intent need not be proved. "The [requisite specific] intent must be to do more than compete vigorously; vigorous competition is precisely what the antitrust laws are designed to foster." *Adjusters Replace-A-Car, Inc.* v. *Agency Rent-A-Car, Inc.*, 735 F.2d 884, 887 (5th Cir.

1984), *cert. denied,* 469 U.S. 1160 (1985). Accordingly, in this Circuit,[3] "[a] statement of intent to compete . . . even if perceived as a threat, is not unlawful. Such a manifestation of intent to triumph in the competitive market, in the absence of unfair, anti-competitive or predatory conduct, is not enough to establish an antitrust violation." *Hayes* v. *Solomon,* 597 F.2d 958, 977 (5th Cir. 1979) (footnote and citations omitted), *cert. denied,* 444 U.S. 1078 (1980). "Rather, the forbidden specific intent is that of acquiring and exercising 'the power to fix prices or to exclude competition.' " *Adjusters Replace-A-Car, Inc.,* 735 F.2d at 887 (quoting *United States* v. *du Pont & Co.,* 351 U.S. 377, 391 (1956)).

The less stringent standard of general intent is met where a business which possesses monopoly power "undertakes a course of action the consequences of which would be to destroy or exclude competition, or if monopoly results as the inevitable consequence of its conduct." *3 Von Kalinowski, Antitrust Laws & Trade Regulation* § 8.02[4] (1986). If a business' conduct is unlawful, or in context evidences a willful, deliberate or conscious acquisition or retention of monopoly power, a general intent to monopolize will be inferred. *Id.* Because Windmere has made both monopolization and attempted monopolization claims, each of which has a different intent standard, we evaluated only the monopolization claim, which carries with it the less rigorous general intent standard, in determining whether Windmere offered the substantial evidence necessary to withstand a motion for a directed verdict.

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[3] In *Bonner* v. *City of Prichard,* the Eleventh Circuit adopted as binding precedent those decisions rendered by the former Fifth Circuit prior to October 1, 1981. 661 F.2d 1206 (11th Cir. 1981).

B. *Predatory Pricing Standards*

The specific conduct which Windmere alleged was anti-competitive and showed Philips' intent to monopolize, was Philips alleged predatory pricing scheme with regard to the sale of its model 1320 and 1615 rotary electric razors. As has been noted by the Supreme Court recently, however, predatory pricing, by either a single firm or as a conspiracy, is by its nature very speculative. *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 106 S.Ct. 1348, 1357-58 (1986). It requires a company or companies to sacrifice present revenues in the expectation of greater future gains. For this risk to be rational, the company or companies must have a very substantial prospect that the losses they incur will be exceeded by the monopoly profits to be earned after rivals have been destroyed. *Id.; see* P. Areeda & D. Turner, *Predatory Pricing & Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 698 (1975) (hereinafter "Areeda & Turner"). "Absent some assurance that the hoped-for monopoly will materialize, *and* that it can be sustained for a significant period of time. '[t]he predator must make a substantial investment with no assurance that it will pay off.'" *Matsushita*, 106 S. Ct. at 1357 (quoting Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 268 (1981)). Repeated predation is often necessary to destroy new entrants, too. Such a strategy is costly, easy to detect and subject to severe sanction. Areeda & Turner, at 699. Consequently, the prospects of an adequate future payoff will seldom be sufficient to motivate predation. *Id.* Thus, "predatory pricing schemes are rarely tried, and even more rarely successful." *Matsushita*, 106 S. Ct. at 1357-58 (citations omitted).

We are constantly reminded that the antitrust laws are designed and intended to protect and promote competition.

Price cutting between competitors as a general rule is precisely the type of conduct our laws are designed to promote. Only when that behavior becomes predatory, that is when the price cutting scheme falls below some measured standard, does it become actionable. Therefore, due to the rarity with which true predatory schemes arise, it is important to carefully define this wrongful conduct, so as not to punish properly competitive behavior. And it is critical that the facts in a particular case be carefully examined and measured against the appropriate standard. As has been noted by the Fifth Circuit, judicial use of the term "predatory intent" is troublesome because several cases hold that a court may infer its existence from a finding of certain actions. *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 722 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). Yet, predatory intent has never been clearly defined. The Supreme Court has stated that "predatory pricing" means pricing below some measure of cost, however, it has not determined which "cost" is relevant. *Matsushita*, 106 S. Ct. at 1355 n.8. The Fifth Circuit, however, has made such a determination. It has stated that in order for a plaintiff to prevail as a matter of law on a predatory pricing claim, it must show that either:

> (1) a competitor is charging a price below his average variable cost in the competitive market or (2) the competitor is charging a price below its short-run, profit-maximizing price and barriers to entry are great enough to enable the discriminator to reap the benefits of predation before new entry is possible.

International Air, 517 F.2d at 724 (footnote omitted).

District Court Opinion

The court chose average variable cost as the appropriate measure as a result of the following analysis. First, the incremental cost of making and selling the last unit (marginal cost), the truly appropriate cost measure, is often difficult to calculate from conventional business accounts. Areeda & Turner, at 716. Thus, average variable cost,[4] which is easier to calculate, may be substituted for marginal cost in a predatory pricing analysis. *Id.* at 717-18, *see International Air,* 517 F.2d at 724. Second, marginal cost was chosen, even though prices at or above it are not necessarily profit-maximizing, because at the point where price equals marginal cost, only less efficient firms will suffer larger losses per unit of output than the alleged monopolist; more efficient firms will be losing less or operating profitably. Areeda & Turner, at 711. "Establishing a price floor above marginal cost would permit survival not only of equally efficient firms, but less efficient ones as well . . . . [T]o force the firm to charge a higher price would reduce industry output and waste economic resources in the short run. . . . Thus, pricing at marginal cost is the competitive and socially optimal result." *Id.* at 711. Thus, in order for Windmere to withstand a directed verdict motion it must have presented substantial evidence that Philips priced the model 1320 and 1615 razors (1) below average variable cost or (2) below its short-run, profit-maximizing price (average variable cost) and that barriers to entry are great.[5]

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[4] Average variable cost is the costs that vary with changes in output divided by the output.

[5] *International Air Industries* suggests that a short-run profit-maximizing price is equal to average variable cost. If this is so, we fail to see how this additional test provides an alternative measure of predatory pricing other than to add the requirement of high entry

(footnote continued on following page)

Because the easier to meet of these two standards requires proof only of pricing below average variable cost, this is the standard we shall evaluate Windmere's evidence against.

IV. EVIDENCE ADDUCED AT TRIAL OF PREDATORY PRICING

The disputes regarding the evidence Windmere introduced to prove predatory pricing involve two primary issues: (1) the proper allocation of Philips advertising expenditures, and (2) the proper method of proving costs—i.e., by using actual costs or projections.

It is undisputed that if all of Philips advertising expenditures are classified as fixed costs, that Philips prices for the model 1320 and 1615 razors exceeded their average variable cost. Windmere, however, claimed that "Norelco's records treated all advertising as "variable costs." Windmere's Theories of Liability, at 10. Windmere, however, has failed to cite to any record evidence to support this statement. Rather, Windmere has cited to legal authority which indicates that in specific cases, courts have found advertising to be a variable cost.

Variable costs, as defined, are costs that vary with changes in output. Areeda & Turner, at 700. Thus, to determine whether a cost is fixed or variable, a court must look at the business plans and records of the particular

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(footnote continued from preceding page)

barriers. If the profit-maximizing price is actually intended to be something greater than average variable cost, we note that this test has been criticized by other courts and has not actually been imposed by any circuit. *See, e.g., Southern Pacific Communications Co.* v. *American Telephone & Telegraph Co.*, 556 F. Supp. 825, 964 (D.C. Cir. 1982), *cert. denied*, 470 U.S. 1005 (1985).

business before it—generalizations simply cannot be made effectively. In the instant case, Philips offered the expert testimony of Mr. Kamerschen on this very subject. Mr. Kamerschen testified that based on his review of Norelco's business and media plans, which he stated contained the type of information an economist would generally rely upon in order to make a judgment of this kind, that Norelco's advertising was a fixed cost. (Tr. 2618-2623). Windmere failed to bring forth any information to the contrary on the cross-examination of this witness.

The only evidence which Windmere pointed to at oral argument on this motion in support of its position were 1984 income statements of Norelco which listed advertising in a category entitled variable expenses. (Tr. 2429). It is clear that such an accounting record cannot alone support the classification of advertising as a variable expense for economic purposes. As noted by Areeda & Turner:

> Marginal, variable, and full costs are economic concepts used to study markets. Financial statements and accounts, on the other hand, are prepared by accountants to aid management in operating the business and also to guide shareholders and other investors. For this reason, the court cannot simply turn to the defendant's financial statements to find the marginal, variable, or full costs relevant for cost based predatory pricing rules.

Areeda & Turner. *Antitrust Law* ¶ 712.1, at 359 (1986 Supp.); *see Janich Bros. Inc.* v. *American Distilling Co.*, 570 F.2d 848, 858 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978) (affirmance of directed verdict where plaintiff presented evidence of prices below cost of merchandise sold rather than average variable cost). Accordingly, we

find that Windmere did not present any competent evidence, much less substantial evidence, to support its claim that Norelco's advertising was a variable expense.

Even assuming, however, that advertising expenses here are properly characterized as variable costs, there is a question whether cooperative advertising support given to Norelco by NVP should be deducted before determining whether Norelco priced the 1615 and 1320 below its average variable cost. NAPC claimed to have received $6,520,000 in advertising support from NVP in 1985. If this amount is properly deducted, then even according to the testimony of Windmere's Vice President of Finance, Burton Honig, Norelco achieved a profit on the sale of the 1320 and 1615 in 1985. (Tr. 2096). Windmere claimed, however, that although this money was earmarked by NVP to be paid to Norelco, that it was never actually paid (Tr. 2425), or alternatively, that this sum was in addition to, rather than part of, the $17.5 million spent by Norelco for advertising in 1985. (Tr. 2424-2425). A review of the record evidence shows that Norelco actually spent $17,558,000 for advertising in 1985 and that $6.6 million of this amount was paid to it by NVP. (Tr. 2451-2452; Defendants' Exhibits 931, 932, 933; Plaintiffs' Exhibit 16). Consequently, we must reject Windmere's wholly unsupported contention.

Windmere next contended that the 1985 receipts for the 1615 and 1320 do not cover average variable costs when advertising expenses are allocated to these models on a per unit basis.[6] Philips responded that advertising should be

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[6] For purposes of this argument, we have considered 1985 advertising expenses to have been $17,558,000. This amount includes the $6.6 million contribution which, as noted previously, we believe should be deducted for purposes of this average variable cost analysis. However, because we wish to evaluate Windmere's arguments independently from one another, we have included this sum, as have all parties in reviewing this contention.

allocated on the basis of revenue received, and that using this method, total receipts for the 1615 and 1320 exceeded average variable costs. We can find no record evidence to support either method of allocation. Although Windmere claimed that Norelco allocated on a per unit basis (Tr. 2428), Philips denied this allegation. (Tr. 2446). Because Windmere had the burden of proof on this issue, we cannot say that it should be able to reach a jury on this contention in the absence of substantial evidence which supports its position.

Furthermore, we find that there is no record evidence which shows that any advertising expenses were incurred specifically for the 1615 and 1320. Windmere claimed that the ads were geared toward the sale of three-headed rotary shavers in general and presumably toward the 1615 and 1320. (Tr. 2431). Philips' exhibits, in contrast, showed that these two models were not nationally advertised. (Plaintiffs' Exhibits 18, 205). Thus, it appears to us, that there is no evidence to suggest that advertising expenses should not be allocated across the full Norelco line of shavers rather than just to the 1615 and 1320. Consequently, we find that Windmere has not presented substantial evidence on this issue.

Finally, we must consider the type of evidence Windmere has offered to support its allegations. As discussed earlier, predatory pricing is very speculative and in most situations, irrational. As a result, a party attempting to prove such allegations bears a heavy burden. The Supreme Court has recently suggested that "[a]s a practical matter, it may be that only direct evidence of below-cost pricing is sufficient to overcome the strong inference that rational businesses would not enter into [such activities]." *Matsushita,* 106 S. Ct. at 1355 n. 9. It is with these concerns in mind that we evaluate Windmere's evidence.

Windmere admitted that its evidence of the cost of batteries, freight, and handling was based on *projections* of the 1985 year. Windmere's Theories of Liability, at 12. (Tr. 2484-85). Indeed, there is no record evidence of the actual amounts paid for 1985. Moreover, the record is silent as to whether Norelco paid any amount for batteries or whether batteries were included in the cost of the razors to Norelco. As noted by Philips, when the cost of batteries is eliminated and these other costs are reduced, Norelco's alleged loss becomes a profit. (Defendants' Exhibits 523, 922, 930). Accordingly, we cannot agree with Windmere that these items are "minor." Although some use of projections undoubtedly is necessary, we find that where such use alone makes the difference between a loss or a profit on an item that the use is too extensive. In view of the Supreme Court's admonition on the importance of direct evidence in predatory pricing cases, we find that Windmere's evidence of below-cost pricing does not meet the substantial evidence standard necessary to withstand a directed verdict.

V. THE NECESSITY OF PROVING BELOW-COST PRICING

Alternatively, Windmere contends that predatory pricing need not be proven in order to prove a § 2 violation. Windmere argued that by lowering their prices on the 1615 and 1320, Norelco intended to destroy Windmere and that such conduct violates the Sherman Act. (Tr. 2413-2414). Windmere relied primarily on *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 105 S. Ct. 2847 (1985), in making this argument. According to Windmere, in *Aspen* the Supreme Court found the existence of an illegal monopoly

where a business refused to continue a joint marketing program—behavior which Windmere characterizes as neither pernicious nor predatory. We reject Windmere's reading of *Aspen*. Aspen involved the question whether one ski company had a duty to continue a joint marketing program for lift tickets with another ski company in the Aspen area. After determining that the relevant geographic market was limited to the Aspen area, that only two companies operated businesses in this area, and that the defendant had market power, the Supreme Court evaluated whether one company had a legal duty to continue to deal with the other company. The High Court began by noting that "[*i*]*n the absence of any purpose to create or maintain a monopoly,* the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Aspen,* 105 S. Ct. at 2857 (emphasis in original) (quoting *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919)). The Court further noted that evidence of intent was relevant to determine whether the challenged conduct was "exclusionary," "anticompetitive," or "predatory." *Id.* In order to determine whether the *Aspen* defendant's conduct was predatory, the High Court looked at its conduct to see if it was "'attempting to exclude rivals *on some basis other than efficiency.*'" *Aspen,* 105 S. Ct. at 2859 (emphasis added) (quoting R. Bork, The Antitrust Paradox 138 (1978)). After determining that the *Aspen* defendant had no legitimate business justifications for its alleged predatory conduct, the Court found that "the evidence supports an inference that [defendant] Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short run benefits and consumer good will in exchange for a

perceived long-run impact on its smaller rival." *Aspen*, 105 S. Ct. at 2861-62.

A review of *Aspen* makes clear that apparent exclusionary conduct, even by a monopolist, is not per se illegal. Rather the conduct must be evaluated for efficiency justifications. Only where there exists no efficiency justification does such conduct violate the Sherman Act. Although *Aspen* involved a refusal to deal, not predatory pricing as in this case, the underlying standard and rationale remain unchanged. Pricing below average variable cost violates the Sherman Act because, based on sound economic theory, there is no efficiency justification for it. Any price above average variable cost may be supported by an efficiency motivation. Accordingly, we reject Windmere's arguments that *Aspen* did not involve predatory conduct and that Philips' price-cutting alone, without a review of its efficiency, necessarily constitutes a violation of § 2 of the Sherman Act. For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that USP, NAPC, and NVP's Motions for a Directed Verdict are GRANTED.

DONE AND ORDERED in Miami, Florida this 8th day of June, 1987.

/s/ STANLEY MARCUS
United States District Judge
Southern District of Florida

APPENDIX C

Judgment of the Court of Appeals, November 14, 1988

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
87-1476

U.S. PHILIPS CORP. and NORTH AMERICAN PHILIPS CORP.,

Plaintiffs-Appellees,

v.

WINDMERE CORPORATION,

Defendant-Appellant.

IZUMI SEIMITSU KOGYO KABUSHIKI KAISHA,

Defendant.

JUDGMENT

ON APPEAL from the U.S. District Court, Southern District of Florida *in CASE NO(S).* 84-2508-CIV

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: REVERSED and REMANDED

ENTERED BY ORDER OF THE COURT

DATED NOV 14 1988

/s/ FRANCIS X. GINDHART
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: JAN 23 1989

APPENDIX D

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
87-1476

U.S. PHILIPS CORP. and NORTH AMERICAN PHILIPS CORP.,

Plaintiffs-Appellees,

v.

WINDMERE CORPORATION,

Defendant-Appellant.

IZUMI SEIMITSU KOGYO KABUSHIKI KAISHA,

Defendant.

Before MARKEY, *Chief Judge*, FRIEDMAN, SMITH, NEWMAN, and MAYER, *Circuit Judges*.

REVISED ORDER

A petition for rehearing having been filed in this case, and a response thereto having been invited by the court and filed,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and same hereby is, denied.

Chief Judge Markey would grant the petition.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT

/s/ FRANCIS X. GINDHART
Clerk

January 13, 1989

APPENDIX E

Order Denying Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
87-1476

U.S. PHILIPS CORP. and NORTH AMERICAN PHILIPS CORP.,

Plaintiffs-Appellees,

v.

WINDMERE CORPORATION,

Defendant-Appellant.

SEIMITSU KOGYO KABUSHIKI KAISHA,

Defendant.

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same is declined.

FOR THE COURT
/s/ FRANCIS X. GINDHART
Clerk

January 27, 1989

APPENDIX F

15 U.S.C. § 2

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Supreme Court, U.S.
FILED
APR 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1630

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NORTH AMERICAN PHILIPS CORPORATION, U.S. PHILIPS CORPORATION and N.V. PHILIPS' GLOEILAMPENFABRIEKEN

Petitioners,

v.

WINDMERE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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April 24, 1989

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QUESTION PRESENTED

The question presented is not that set forth in the petition for certiorari, but is simply whether the Federal Circuit Court of Appeals ruled correctly that substantial conflicts in the evidence exist in this case as to cost, intent, and the exercise of monopoly power under section 2 of the Sherman Act, which must be resolved by a jury.

RULE 28.1 LIST

Respondent Windmere Corporation ("Windmere") has no subsidiaries or affiliates to list pursuant to Rule 28.1.

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No. 88-1630

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NORTH AMERICAN PHILIPS CORPORATION, U.S. PHILIPS CORPORATION and N.V. PHILIPS' GLOEILAMPENFABRIEKEN

Petitioners,

v.

WINDMERE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The petition for a writ of certiorari should be denied; the holding of the Federal Circuit Court of Appeals was that issues of fact remain which the jury can sift through and determine for either the Philips entities or Windmere. The notion that this conflict in the evidence as to the question of "average variable costs" requires this Court's attention is unfortunate. Indeed, the question presented assumes the contested facts which the jury must decide: Philips did not have simply a "large market share", but was plainly a monopolist with only one competitor, which was removed by Philips' conduct. Further, Philips did not use "profitable prices" but cannibalized its entire division causing a de-

struction of its short-run profits. Finally, the petitioners' question assumes that these prices were "above average variable cost"; a fact which the court of appeals said should be tried by a jury because of the conflicting evidence.

The real and only question presented at this stage of the case is whether the court of appeals was correct in its unmistakably clear holding that questions of fact exist on these issues—and others—which must be resolved by a jury trial. There can be no doubt under the law of the Eleventh Circuit and the pronouncements of this Court that such questions of fact are to be resolved by the jury and the question of the subtleties of antitrust law that may then emerge is plainly dependent upon the instructions used and the jury's solution to factual conflicts under such instructions.

COUNTERSTATEMENT OF THE CASE

The petition for a writ of certiorari should be denied for at least three reasons:

First. Both the trial court and the court of appeals held that Philips, under the evidence, was a monopolist in the sense that Philips controls over 90% of the domestic sales of the relevant product. (A3, 18) Indeed, Windmere was the only manufacturing competitor of the defendant and was eliminated from the industry by the deliberate practices of Philips. (A10-11) The court of appeals reviewed the evidence which supported Windmere's position that the defendant sold its products below average variable cost—wilfully—to maintain a monopoly and eliminate Windmere's competition. (A1-13, 19-21) In this response Windmere does not intend to burden this Court with a further review of that evidence. The Federal Circuit simply said that a jury could find for Windmere on that issue if Windmere's evidence were believed by the jury. (A20) It is hardly necessary to

note that the question before this Court is whether there is evidence to support Windmere's position; Philips' brief and limited review of some evidence, which supports its position, is hardly an answer to this question.

In short, based on the decision of the Federal Circuit, the jury could find that Philips sold its products—intentionally—to eliminate a competitor below average variable cost. No matter what instruction is given to the jury, such a finding would be supported on appeal in every court of appeals. In that sense, there is no conflict among the circuits.

Second. The question presented asks this Court to assume that petitioners' sales were "profitable"; that assumption is regrettable. The evidence presented demonstrated that petitioners' profits were "cannibalized" and short-run profits were destroyed until Windmere's exit; then prices were increased. (A6-9) Windmere has naturally argued the law of the Eleventh Circuit, and its Fifth Circuit predecessor, because this case was tried in the Southern District of Florida. Under decisions of the Eleventh Circuit, a monopolist also violates section 2 of the Sherman Act if its products are sold at unreasonably low prices with the intent to eliminate competition by sacrificing short-run profits in an industry with barriers to entry which are "great enough to enable the (firm) to reap the benefits of predation before new entry is possible." *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

The evidence establishes (if believed by the jury) that Philips sacrificed its short-run profits during the time in which Windmere was competing in the market and then after Windmere's elimination Philips raised prices back to the pre-entry level. It is uncertain as of today whether the jury, under a special interrogatory, would find for Windmere

on this theory. There is simply nothing for the Court to review because no jury instructions were ruled on, and the jury may decide the matter in a fashion to make the issue moot. In sum, Windmere respectfully suggests that petitioners' statement of the issue will invite the Court to review the substantial evidence proving petitioners' loss of profits and legal positions of the parties that have yet to be framed with jury instructions.

Third. The petition invites this Court to accept this case on the apparent grounds that the Federal Circuit improperly relied on prior Supreme Court authority. The petition states that the Federal Circuit's opinion is simply wrong: it turned antitrust law "on its head." (Pet. at 3) The apparent basis for that suggestion is a paragraph in the Federal Circuit's opinion citing the Supreme Court's decisions in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), and *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946):

> To be sure, Philips introduced evidence designed to show that its actions were legitimate competitive responses prompted by the entry of Windmere into the market. The evaluation of all the evidence bearing on the nature of Philips' actions and the inferences to be drawn from the evidence, was for the jury to determine. If the jury had credited Windmere's evidence and rejected Philips', it could have returned a verdict for Windmere. Evidence that a firm holding 90 percent of a market that has substantial entry barriers drastically slashes its prices in response to the competition of a new entrant, for the purpose and with the effect of eliminating that entrant, is sufficient to show monopolization, in violation of section 2 of the Sherman Act. *Cf. Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11 (1985); *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946).

(A18).

The court of appeals correctly observed that in both *American Tobacco,* and the more recent *Aspen Skiing* decision, this Court affirmed verdicts against defendants based upon section 2 of the Sherman Act. Without again burdening the Court with an extensive review of the facts of those cases, Windmere respectfully suggests that both *American Tobacco* and *Aspen Skiing* stand for the proposition that a monopolist with power over entry and price cannot intentionally create or maintain the condition of monopoly by deliberate practices directed at the monopolist's only rival. In short, what a company may do with a 10% market share may be different from the responsibilities of a company with 90% of the market.

In *American Tobacco Co.* v. *United States,* 328 U.S. 781 (1946), this Court found that a group of tobacco companies had entered a criminal conspiracy to monopolize interstate commerce by engaging in certain pricing practices to exclude competitors from the market. Thereafter, an entry was made by several smaller companies selling "cheap" cigarettes. The monopolists then cut their prices several times eliminating the cheaper cigarettes from the market. The Court held:

> The petitioners' cuts in their list prices and the subsequent reductions in the retail prices of their products resulted in a victory over the 10 cent brands.

Id. at 806. There was no finding that these price cuts were predatory or below any "cost standard." Rather, they were exclusionary pricing practices that "maintain[ed] the power to exclude competitors." *Id.* at 809. The gravamen of the offense was that "they (were) able, as a group, to exclude actual or potential competition from the field . . . and they have the intent and purpose to exercise that power." *Id.* (citation omitted) Indeed (like Philips) the defendants raised prices after removing the only new entrant.

Most recently the Court in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), held that a monopolist violated § 2 by refusing to maintain a joint marketing plan to the detriment of its sole competitor. In *Aspen Skiing,* this Court approved a jury instruction that is plainly at odds with petitioners' view and supports the opinion of the Federal Circuit:

> [W]hether Aspen Skiing Corporation willfully acquired, maintained, or used that power (monopoly power) by anti-competitive or exclusionary means or for anti-competitive or exclusionary purposes.

Id. at 596. The Court noted that the defendant did not offer any "justification" for its conduct. The Court found a violation of § 2 even though the monopolist's actions in eliminating its sole competitor were not predatory:

> Although Ski Co.'s pattern of conduct may not have been as "bold, relentless, and predatory" as the publisher's actions in *Lorain Journal,* the record in this case comfortably supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival.

Id. at 610 (footnote omitted). The mischief of defendant's conduct in *Aspen Skiing,* as here, was that the practice was used deliberately to remove the only competitor with the intent of maintaining a monopoly.

The petitioners erroneously suggest that this Court's decision in *Matsushita Elec. Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) supports Philips' position. The decision, however, in *Matsushita* does not address the appropriate behavior of a monopolist. The plaintiffs in *Matsushita* had 40% of the market; that share had not changed materially in the twenty years in which a supposed conspiracy existed. *Id* at 591. The Court held that "[t]he prospects

of attaining monopoly power seem slight." *Id.* at 590. *Matsushita* concludes that a conspiracy to monopolize cannot be inferred when the industry has experienced twenty years of competition and monopoly power does not exist and is not foreseeable. *Id.*

The court of appeals did not err here in holding that a reasonable jury could find for Windmere by deciding that Philips is a monopolist that sold its products below average variable cost. The Court may well not prefer to accept the invitation to review in depth all of the facts which led the court of appeals to that conclusion. Further, the notion that the court of appeals erroneously invoked this Court's decisions in *Aspen Skiing* and *American Tobacco* is flawed. Under those cases, it is for the jury to decide whether the many acts of the defendant were permissible business decisions or a deliberate, documented intention to destroy competition and maintain a monopoly.

The jury has yet to hear the form of instruction to be used, which may well define one or three theories of liability under section 2 of the Sherman Act. Indeed, the jury has the privilege of deciding all issues, including the "average variable cost" theory for the defense, thereby mooting the pending petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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